178.5
R34b

Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—VS—

A. MITCHELL PALMER, ATTORNEY GENERAL AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, Defendants

---

Brief of Complainant on Motion to Dismiss

STATE OF RHODE ISLAND
HERBERT A. RICE
Attorney General
A. A. CAPOTOSTO
Assistant Atty. Genl.

PROVIDENCE:
1920

CENTRAL CIRCULATION BOOKSTACKS

The person charging this material is responsible for its renewal or its return to the library from which it was borrowed on or before the **Latest Date** stamped below. **You may be charged a minimum fee of $75.00 for each lost book.**

Theft, mutilation, and underlining of books are reasons for disciplinary action and may result in dismissal from the University.

TO RENEW CALL TELEPHONE CENTER, 333-8400

UNIVERSITY OF ILLINOIS LIBRARY AT URBANA-CHAMPAIGN

MAR 07 1999

APR 05 1999

When renewing by phone, write new due date below previous due date. L162

Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—vs—

A. MITCHELL PALMER, ATTORNEY GENERAL
AND DANIEL C. ROPER, COMMISSIONER
OF INTERNAL REVENUE, Defendants

Brief of Complainant on Motion to Dismiss

STATE OF RHODE ISLAND
HERBERT A. RICE
Attorney General
A. A. CAPOTOSTO
Assistant Atty. Genl.

PROVIDENCE:
1920

Digitized by the Internet Archive
in 2018 with funding from
University of Illinois Urbana-Champaign Alternates

https://archive.org/details/octoberterm1919n00unit

178.5
R346
44B-58

INDEX

21 Ag 23 M
6 Dec. '20. Dis. of
456

CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1919

No. 29 Original

STATE OF RHODE ISLAND, Complainant

—VS—

A. MITCHELL PALMER, ATTORNEY GENERAL AND DANIEL C. ROPER, COMMISSIONER OF INTERNAL REVENUE, Defendants

---

Brief of Complainant on Motion to Dismiss

The State of Rhode Island alleges in its bill that the Sixty-fifth Congress of the United States of America at its Second Session begun and held at the City of Washington on Monday, the third day of December, A. D. one thousand nine hundred and seventeen, assuming a power not delegated to Congress by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, and of the rights of the people thereof, enacted a "Joint Resolution Proposing an Amendment to the Constitution of the United States", pretending to submit thereby to the Legislatures of the several States of the United States a so-called Eighteenth Amendment to the Constitution of the United States, whereby it was provided that the manufacture, sale and transportation of intoxicating liquors for beverage purposes within the State of Rhode Island should be prohibited;

said "Joint Resolution Proposing an Amendment to the Constitution of the United States" being in the following form:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (*two-thirds of each House concurring therein*), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE

"Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

The complainant avers that the power exercised by Congress in enacting the said Joint Resolution, pretending to submit thereby to the Legislatures of the several States of the United States the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to Congress by the provisions of Article V of the Constitution of the United States, and the exercise by Congress of the power to enact such Joint Resolution,

as aforesaid, was a proceeding unconstitutional and revolutionary; and further, that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, is not a proposal of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but is an unconstitutionl and revolutionary proposal to the Legislatures of the several States of a revision and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a proposal of a valid amendment to the Constitution of the United States and under the form and pretense of complying with constitutional procedure; and further, that the proposal of the so-called Eighteenth Amendment, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

The complainant further avers that although the proposal of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was unconstitutional, inoperative and void, on the 28th day of December, A. D. 1917, the Honorable Robert Lansing, Secretary of State of the United States, without authority in law and under the form and pretense of complying with constitutional procedure, forwarded a certified copy of said "Joint Resolution Proposing an Amendment to the Constitution of the United States," to the Governor of each State of the United States, and that the Governors of the several States of the United States thereafter submitted the so-called Eighteenth Amendment to the Constitution of the United States, as set forth in the Joint Resolution of Congress, as aforesaid, to their respective Legislatures, and thereafter the Legislatures of three fourths of the several States

of the United States, assuming a power not delegated to said Legislatures by any provision of the Constitution of the United States, and in derogation of the constitution and laws of the State of Rhode Island, enacted resolutions of alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States as submitted by Congress, as aforesaid, under the form and pretense of complying with constitutional procedure provided in the case of a valid amendment to the Constitution of the United States, and thereafter certified copies of the resolution of alleged ratification of the so-called Eighteenth Amendment by the aforesaid Legislatures were forwarded to the State Department of the United States, the certification of the alleged ratification from each State illegally and erroneously setting forth that the so-called Eighteenth Amendment to the Constitution of the United States had been adopted as an amendment to the Constitution of the United States by the Legislature of said State according to the provisions of the Constitution of the United States.

The complainant further avers that the power exercised by each of the Legislatures of the several States of the United States in enacting an alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, as aforesaid, was not delegated to the Legislatures of the several States of the United States by the provisions of Article V of the Constitution of the United States, and the exercise by each of the Legislatures of the several States of the power to enact a resolution of alleged ratification of the so-called Eighteenth Amendment, as aforesaid, was a proceeding unconstitutional and revoluntionary; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States as aforesaid, was

not a ratification of an amendment to the Constitution of the United States within the intent, purview and scope of Article V of the Constitution of the United States, but was an unconstitutional and revolutionary proceeding in reference to a revision of and addition to the Constitution of the United States that is destructive of the fundamental principles of said Constitution and of the government established thereby under the form and guise of a ratification of a valid amendment to the Constitution of the United States, and under the form and pretense of complying with constitutional procedure; and further, that the alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States by each of the Legislatures of the several States, for the reasons aforesaid and otherwise, was unconstitutional, inoperative and void.

And complainant further avers that the Congress of the United States and the Legislatures of the several States of the United States are the representatives and agents of the people of the United States in proposing and ratifying amendments to the Constitution within the intent, purview and scope of Article V of the Constitution of the United States, and within the intent, purview and scope of the original delegation of powers to the people of the United States under the Constitution of the United States; and that the alleged proposal by Congress, as aforesaid, and the alleged ratification by the Legislatures of the several States, as aforesaid, were not within the scope of the original delegation of powers to the people of the United States and were not within the power and authority of Congress and the Legislatures as agents of the people of the United States; and further, that the Congress of the United States and the Legislatures of the several States, as aforesaid, are neither the judges of their respective powers nor of the

limitations thereof under the Constitution of the United States.

And complainant further avers that the Governor of the State of Rhode Island submitted the proposal of the so-called Eighteenth Amendment, as aforesaid, to two successive General Assemblies of the State of Rhode Island, said General Assembly being the Legislature of the State of Rhode Island, and both of said General Assemblies refused to enact any resolution in alleged ratification of the so-called Eighteenth Amendment to the Constitution of the United States, and refused to regard or entertain the proposal of said so-called Eighteenth Amendment to the Constitution of the United States as a valid proposal of amendment, and the General Assembly of the State of Rhode Island has ever asserted and now asserts that the proposal of the so-called Eighteenth Amendment to the Constitution of the United States is not a valid proposal of amendment to said Constitution, and that the General Assembly has no power or authority to ratify or approve said so-called Eighteenth Amendment as a valid amendment to the Constitution of the United States; and further, that the Constitution of the United States does not delegate to the government of the United States, nor to the people of the United States, any power of police and economy with respect to the internal affairs of the State of Rhode Island, nor is said power with respect to the internal affairs of the State of Rhode Island prohibited by said Constitution to the State of Rhode Island, but is expressly reserved to the State of Rhode Island and the sovereign people thereof; and further, that neither the power of police and economy with respect to the internal affairs of the State of Rhode Island nor the discretion in the exercise thereof can be bargained away, surrendered, yielded or transferred effectually to bind the

people of said State and their posterity, if at all, without "an explicit and authentic act of the whole people" of said State.

And finally the complainant avers that thereafter Congress, illegally and erroneously assuming that a power had been delegated to it by the provisions of the so-called Eighteenth Amendment, passed an act commonly known as the Volstead Act, with the intent and purpose of enforcing the so-called Eighteenth Amendment within the State of Rhode Island; that such portion of said Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, in so far as the same relates to the manufacture, sale, barter, transport, delivery, furnishing or possession of any intoxicating liquor within the State of Rhode Island, or the making of any of said acts within the State of Rhode Island a crime against the United States, said acts within the State of Rhode Island being lawful and authorized under the constitution and laws of the State of Rhode Island; that although the so-called Eighteenth Amendment is unconstitutional and void, and although such portion of the so-called Volstead Act as relates and applies to the enforcement of the so-called Eighteenth Amendment is unconstitutional and void, it is nevertheless the purpose, intent and threat (now executed) of the defendants to enforce the fines, imprisonments and forfeitures provided in said Volstead Act, as aforesaid, within the State of Rhode Island, on the ground that the manufacture, sale, barter, transport, delivery, furnishing, or possession of intoxicating liquor within the State of Rhode Island is contrary to law and a crime against the United States, although all said acts within the State of Rhode Island are lawful and authorized under the constitution and laws of said State; and alleging irreparable

injury and damage to the State of Rhode Island and to the people thereof, complainant prays injunctive relief.

(2) Motion to Dismiss

The motion for leave to file the bill having been granted, and the bill having been filed, the defendants now present the following motion to dismiss in the nature of a demurrer:

> "Before answering the bill of complaint in the above-stated case come now the defendants therein and present this motion to dismiss said bill of complaint in the nature of a demurrer thereto, and pray that such bill be dismissed upon the following grounds:
>
> "*First.* Because the matters and things set up in said bill of complaint present no matter of a justiciable character between said complainant and these defendants, nor does it set up any subject matter properly involving the jurisdiction of this court under the grant of judicial power to said court.
>
> "*Second.* Because the facts stated in said bill of complaint do not set up any cause of action.
>
> "*Third.* Because the said bill of complaint alleges no cause of action against these defendants or either of them.
>
> "*Fourth.* Because there is no equity in said bill of complaint.
>
> "Wherefore these defendants pray that said bill of complainant be dismissed and these defendants be not further required to plead thereto."

(3) Original Jurisdiction of Supreme Court

The jurisdictional power of this Court to afford equitable relief to the compainant turns upon the theory and averments of the bill that the so-called Eighteenth Amendment is usurpatory and void. The equity of the bill depends upon the correctness of its theory. *United States* v. *Lee,* 106 U. S. 196, (1882); *Ex parte Young,* 209 U. S. 123, 155, (1908); *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619, (1911); *Traux* v. *Raich,* 239 U. S. 33, 37, (1915); *Wilson* v. *New,* 243 U. S. 332, (1917); *Hammer* v. *Dagenhart,* 247 U. S. 251, (1918). A preliminary question therefore is presented for the determination of this Court, a question of constitutional interpretation. Is the so-called Eighteenth Amendment usurpatory and void? This brief is addressed to that issue.

In approaching any discussion of conflict between the respective powers of a State and those of the Nation, the words of Mr. Chief Justice Marshall, in the great case of *McCulloch* v. *Maryland,* 4 Wheat. 316, 400, (1819), naturally recur. About to establish for all time the boundaries which separate the two jurisdictions, he thus solemnly prefaced his opinion in that case: "The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this

tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."

In the same case, the Chief Justice, in considering the jurisdiction of this Court and the high duty imposed upon it by the Constitution, observed: "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." And he added: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Two years later, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, 384, (1821), Mr. Chief Justice Marshall, with keen insight to the possible necessity of a later day, laid down a rule of construction that is here applicable. In speaking of the proposition that the judicial power of every well-constructed government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of its constitution, he said:

> "If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purports to establish this principle, shall be contracted for the purpose of destroying it."

This rule of construction as to the extent of the judicial power, thus stated in *Cohens* v. *Virginia,* was approved and applied in the noted case of *Ableman* v. *Booth,* 21 How. 506, 520, (1858). There Mr. Chief Justice Taney made it clear that it was within the province of this Court to check usurpation and to protect the States from encroachment upon their reserve powers by the general government, that the supremacy of the Constitution might be maintained. In delivering the opinion of the Court, he asserted:

> "The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be *an assumption of power beyond the grants in the Constitution.*
>
> "This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also *to guard the States from any encroachment upon their reserved rights by the General Government.* And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the

limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. * * *

"So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating *controversies between sovereignties,* which in other countries have been determined by the arbitrament of force."

In the last judicial paper from the pen of Mr. Chief Justice Taney, an opinion upon the question of jurisdiction in the case of *Gordon* v. *United States,* 2 Wall. 561, (1864), reported in *Gordon* v. *United States,* 117 U. S. 697, 700, (1864), that eminent jurist positively declared the powers and duties of this tribunal in cases of conflicting sovereignties. This opinion furnishes ample support to complainant's cause. We quote from it extendedly:

> "The position and rank, therefore, assigned to this Court in the Government of the United States, differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights.
>
> "The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the

United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, *an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose,* and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

"In No. 38 of the Federalist, written by Mr. Madison, the necessity and object of this provision is clearly stated. In that number, after explaining with great perspicuity the complex character of the government, being partly National and partly Federal, he proceeds to say (page 265 Towson's Ed.): 'In this relation, then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and *leaves to the several States a residuary and inviolable sovereignty over all other objects.*' * * *

"It was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government; its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments. And it is upon the principle of the perfect

independence of this Court, that in cases where the Constitution gives its original jurisdiction, the action of Congress has not deemed necessary to regulate its exercise, or to prescribe the process to be used to bring the parties before the court, or to carry its judgment into execution. The jurisdiction and judicial power being vested in the court, it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the court in this respect.
* * *

"The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI, the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth Amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. *The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument.* And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question."

There may be added the statement of Mr. Justice Brewer in the case of *In re Heff,* 197 U. S. 488, 505 (1905): "In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one

of the chief functions of this Court is to preserve the balance between them, protecting each in the power it possesses, and preventing any trespass thereon by the other." Mr. Justice Brewer expressed the same view in the later case of *South Carolina* v. *United States,* 199 U. S. 437, 448 (1905) :

> "We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme and in respect to them *the National Government is powerless.* To preserve the even balance between these two governmnts and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty."

(4) Propriety of State Action.

As set forth in the brief of the complainant upon the motion to file, the defendants without any warrant in law are exerting an authority over the internal affairs of the State of Rhode Island that is in defiance of those original and inherent powers of the State, never delegated, but reserved under the Constitution. The defendants are interfering with the exercise of those powers and with the functions of State government. "Bound hand and foot by the prohibitions of the Constitution, a complainant State can neither treat, agree, or fight with its adversary." Under these circumstances it is the highest right and duty of the State as a matter of self-preservation to assert its authority and seek to maintain it in this Court. Where, as

in this case, the wrongs are threatened by officials of the Federal Government who are beyond the territorial boundaries of the State this tribunal is not merely the proper, but the only tribunal in which the authority of the State may be vindicated.

In re Debs, 158 U. S. 564, (1895) on a petition for a writ of habeas corpus brought by the defendant Debs to relieve him from imprisonment for contempt, after having disobeyed an injunction forbidding interference with trains carrying the mails, the defendant contended that the United States had no standing in a court of equity and that therefore the injunction was invalid. Mr. Justice Brewer, in delivering the opinion of the Court, said:

> "Neither can it be doubted that the government has such an interest in the subject matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property and the government has no property interest. A sufficient reply is that the United States have a property in the mails. * * *"
>
> "We do not care to place our decision upon this ground alone. Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interests of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

That it is as important for a State government to seek assistance from the Court in the exercise of its powers and the discharge of its duties as it is for the Federal Govern-

ment, was clearly indicated by Mr. Justice Day in *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, (1917) :

> *"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.*
>
> "In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County* v. *Oregon,* 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government."

The State, however, has a further interest in this suit. It not only seeks to prevent an interruption in the exercise of its governmental powers, but also seeks the protection which this Court may afford by injunctive relief from irreparable damage to its property interests. The State and its subdivisions have already lost considerable sums by the refusal of its citizens to take out licenses for the sale of non-intoxicating liquors, said non-intoxicating liquors under the laws of the State of Rhode Island being intoxicating liquors under the so-called Volstead Act. The refusal to take out said licenses is due to fear of fines and penalties under the provisions of the so-called Volstead Act and in consequence of the threats of the defendants to enforce said Act although unconstitutional and void. The State and its subdivisions will continue to lose large sums aggregating more than six hundred thousand dollars per year. The State will also suffer serious losses in its income from taxes on ratable property, which it has by its laws permitted to be created and to

exist within the State under its protection. This property damage, however, the defendants contend is remote and indirect. They even assert that there is no deprivation of property or property rights because the State is not deprived of a fund now existing or to which its right has already accrued. Such a limited view of the scope of equitable jurisdiction and relief is entirely at variance with the recent decisions of this Court.

In the case of *Hammer* v. *Dagenhart, supra,* a bill was filed in the United States District Court for the western district of North Carolina by a father in his own behalf, as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employes in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of an Act of Congress, intended to prevent interstate commerce in the production of child labor. The suit was directed against the United States Attorney. The District Court held the act unconstitutional, and entered a decree enjoining its enforcement. The cause came to this Court on appeal and the decree of the District Court was here affirmed. The only property interest protected by equity was the right of continuing in an employment undisturbed by enforcement of an unconstitutional act.

The case of *Traux* v. *Raich,* 239 U. S. 33, (1915) is of a similar nature. The State of Arizona passed a law providing that no employer of more than five workers shall employ not less than eighty per cent of qualified electors or native-born citizens. The appellee was a native of Austria and an inhabitant of Arizona, but not a qualified elector. He was employed as a cook by the appellant, Traux. Traux had nine employes, of whom seven were neither native-born citizens of the United States or qualified electors. The appel-

lee was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon the appellee filed his bill in the District Court of the United States for the District of Arizona to enjoin the Attorney General of the State of Arizona from enforcing the act. The bill sought a decree declaring the act to be unconstitutional and restraining procedure thereunder. The District Court enjoined the defendants from enforcing the act and on appeal to this Court the decree of the District Court was affirmed. In reference to the claim of the appellants that the bill did not state facts sufficient to constitute a cause of action in equity, Mr. Justice Hughes, delivering the opinion of the Court, said:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one of the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." . . .
>
> "It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162); that is, that

> the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

In discussing the basis of equitable jurisdiction in the recent case of *International News Service* v. *Associated Press,* 248 U. S. 236, (1918) the Supreme Court said:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of pecuniary nature as a property right * * * and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

Hammer v. *Dagenhart,* 247 U. S. 251 (1918).

Wilson v. *New,* 243 U. S. 332 (1917).

Traux v. *Raich,* 239 U. S. 33 (1915).

Dobbins v. *Los Angeles,* 195 U. S. 223 (1904).

The State of Rhode Island is a party in interest in this suit not only for the protection of its governmental and property rights in its corporate capacity, but it also has an

interest and a duty to all its citizens to secure to them their common rights whenever the action complained of affects the public at large. This suit therefore is brought not only on behalf of the State, but also on behalf of the people of the State. This interest in the people of the State rests upon the obligation to protect all the citizens of the State in the unrestricted exercise and free enjoyment of all those rights and privileges to which they are entitled. The State in thus acting as trustee, guardian or representative of all the people has an interest in the matter at issue, even if it had itself no pecuniary or property rights of its own involved.

In *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907) an original bill in equity was brought by the State of Georgia to enjoin a foreign corporation from discharging noxious gases from its works in Tennessee over large tracts of territory in Georgia. The bill alleged that the noxious gases worked a wholesale destruction of forests, orchards and crops, and that other injuries resulted and were threatened. The jurisdiction was sustained and an injunction granted by this Court. Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity as quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests, and its inhabitants shall breathe pure

air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner, is *merely a makeweight,* and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads. * * *

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulties of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. *The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law.*"

The view that it is the duty of the Nation or State to enforce the common rights of its citizens is expressed in the case of *In re Debs,* 158 U. S. 564 (1895). Mr. Justice Brewer there remarked:

"It is obvious from these decisions that while it is not the province of the government to interfere in the mere matter of private controversy between individuals or to use its great powers to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large and are in respect of matters which by the Constitution are intrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or to prevent it from taking measures therein to fully discharge those constitutional duties."

A State holds in trust the public interests of its citizens, and where it seeks to fulfil its obligation under that trust

by injunctive process, a pecuniary interest of the State in the relief sought is not essential. It is enough if there be an interest or concern arising out of the obligation to those for whose benefit the suit is brought. Mr. Justice Van Devanter in *United States* v. *New Orleans Pacific Railway Co.*, 248 U. S. 507 (1919).

The General Assembly of Rhode Island regarded the proposal by Congress of the so-called Amendment as revolutionary and usurpatory and refused to entertain it. In view of its oppressive character the Legislature directed this action with the purpose of protecting and defending the sovereign powers of the State and the liberty and independence of its people. The States of the Union stand upon an equality. Rhode Island seeks no advantage peculiar to itself, but only that protection to which every State is entitled under the Constitution. It acts in the only way in which it may act through its legislative body and legal officers, and while its course, like the occasion of it, may be without precedent, it is not without the highest constitutional sanction.

The situation which has arisen through the usurpation of power by Congress was feared from the beginning, although the particular guise under which it has been brought about was not anticipated. When the adoption of the Constitution was under discussion the State governments were regarded as the natural barrier between the liberties of the people and any invasion which might be attempted by the general government. "Every new power given to Congress," said Mr. Nicholas of Virginia, "is taken from the State Legislatures; they will be, therefore, very watchful over them (Congress); for, should they exercise any power not vested in them, it will be a usurpation of the rights of the different State Legislatures, who would sound the alarm to the people." El. Deb., Vol. 3, p. 18. Mr. Ames

of Massachusetts observed: "The state governments represent the wishes, and feelings, and local interests, of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights." El. Deb., Vol. 2, p. 46. "If there should be a usurpation," said Mr. Parsons of Massachusetts, "it will be upon thirteen legislatures, completely organized, possessed of the confidence of the people, and having the means, as well as inclination, successfully to oppose it. Under these circumstances, none but madmen would attempt a usurpation, but, sir, the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance." El. Deb., Vol. 2, p. 94.

The propriety of state action in the manner here pursued is clearly indicated by Mr. Hamilton in several of his arguments before the New York Convention. Elliot's Debates, Vol. 2.

> "The most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays of teachery. They will institute regular modes of inquiry. The complicated domestic attachments, which subsist between the state legislatures and their electors, will ever make them vigilant guardians of the people's rights." p. 266.
>
> "The people have an obvious and powerful protection in their state governments. Should any thing dangerous be attempted, these bodies of perpetual observation will be capable of forming and conducting plans of regular opposition. Can we suppose the people's love

of liberty will not, under the incitement of their legislative leaders, be roused into resistance, and the madness of tyranny be extinguished at a blow? Sir, *the danger is too distant; it is beyond all rational calculations.*" p. 253.

"Whenever Congress shall meditate any infringement of the state constitutions, the great body of the people will naturally take part with their domestic representatives. Can the general government withstand such a united opposition? *Will the people suffer themselves to be stripped of their privileges? Will they suffer their legislatures to be reduced to a shadow and a name? The idea is shocking to common sense.*" p. 304.

The people of Rhode Island, therefore, with the same love of liberty and independence as animated the Fathers of the Republic, seek in this only orderly way available to resist usurpation and to maintain the principles of the Constitution in all their vigor and guard them from the destructive influence of a despotism that is no less hateful and oppressive because of its pretended benevolence.

(5) The Issue.

The State of Rhode Island seeks to enjoin within its territorial limits the enforcement of the Volstead Act. The title "Volstead Act," as herein used, refers only to those portions of that Act which were designed to carry into effect the so-called Eighteenth Amendment. The other portions, enacted under the war powers of Congress, have no connection with this cause. The complainant avers that the Volstead Act is unconstitutional, not because of its drastic and summary provisions, but on the ground that Congress had no authority whatever to legislate upon the subject matter for

times of peace. Congress exercised that authority upon the assumption that the so-called Eighteenth Amendment was valid. If the so-called Amendment is invalid, the Volstead Act, so far as it applied to that Amendment, has no sanction in law. This brief, therefore, is limited to the contention that the so-called Amendment is invalid.

Neither time nor space will permit a discussion of all the objections that might be raised to the so-called Amendment; and yet some of the objections to it, not dealt with in this brief, are so serious that they should not be overlooked in reaching a just estimate of its constitutional standing and value. The attention of the Court may be called to the following apparent defects, thus briefly stated: that the so-called Amendment is in form a municipal regulation, an enactment of law; that it is merely a regulation of personal conduct; that it has no relation to any article or section of the Constitution, nor to any power delegated thereby, nor to any object or purpose expressed therein; that it has no reference to the structure of government and does not involve any political principle; that it converts the amending function into a legislative power and thus conflicts with Article I, Section 1, of the Constitution; that in the provision that Congress and the several States shall have "concurrent power" to enforce the article, it creates a conflict between sovereignties that are independent and separate; that in the provision limiting ratification within seven years, it imposes an unconstitutional restriction upon the Legislatures; that instead of amending the Federal Constitution, it amends the Constitution of every State in the Union without the consent of the people thereof.

Without waiving the privilege of urging in argument any ground of invalidity, the State of Rhode Island prefers to contest the issue in its more fundamental aspect, that the

so-called Amendment is a direct invasion of the jurisdiction and powers of the State and of the rights of its people, and is wholly unauthorized by the amending clause of the Constitution. The first section of the so-called Amendment reads: "After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the *United States* and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited." If the provisions of this first section were intended to apply to the territory over which the United States has territorial jurisdiction, with reference to the power exercised and the subject matter regulated, no exception could be taken by a State in regard thereto. The United States, however, has no territorial jurisdiction within a State, either in respect to the power exercised or in respect to the subject matter regulated by the so-called Amendment. It has such jurisdiction under the Constitution only in the District of Columbia, in the territories and insular possessions. The propaganda in connection with the alleged proposal by Congress and the alleged ratification by the Legislatures, and the provisions of the so-called Amendment as a whole make it clear that the term, "United States," was intended to be and is construed as including the territory of all the States as subject to the jurisdiction of the United States in respect to the power exercised and the subject matter regulated. The purpose, therefore, of this so-called Amendment is to impose federal authority, within the territorial limits of the States, over a subject matter that is inseparable from territorial sovereignty, although the execution of this purpose involves stripping the respective States and the sovereign people thereof of a power and of a discretion in the exercise of that power that they have possessed and enjoyed as

inalienable from the beginning. The right of self-government is impaired, and self-government is liberty.

Whether this so-called Amendment is valid depends upon the construction of Article V, which reads in part as follows:

> "The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendment to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; * * *."

If the position of the defendants, relating to the merits of the controversy, is correctly understood from the brief filed and the arguments advanced in opposing the motion for leave to file the bill, it is substantially this:

First. The defendants contend that the amending function of Congress and the Legislatures of three-fourths of the States is a substantive power.

To this the complainant makes answer that the amending function of Congress and the Legislatures of three-fourths of the States is not a substantive power. Amending a constitution is not a purpose nor an end of government. Government is not instituted nor powers delegated that they may be corrected. The amending function is merely an incident, an accompaniment to the framing of the Constitution. It was not regarded as a legislative, executive or judicial power, nor classed with those substantive powers in Articles I, II, and III, of the original Constitution. Its place in Article V, at the end of all delegated powers, is not without significance. It indicates that it is an appurtenance to what

precedes; a precautionary safeguard to insure that the great ends to be attained, as set forth in the instrument itself, should not be defeated by unintentional error committed in the process. Had Article V been omitted altogether, the structure of government would have still been complete and its operation assured. With such an omission an amendatory function might have been inferred as an incident to the powers delegated, in order that the purpose of the instrument might not be defeated. In fact, so non-essential did this amendatory provision appear to some of the members of the Federal Convention that it was moved to strike out Article V altogether from the draft. *Farrand,* Fed. Conv., Vol. 2, p. 630.

Second. The defendants contend that an "amendment to this Constitution" means any addition to, subtraction from, change in, alteration or revision of this Constitution.

To this the complainant makes answer that an amendment to this Constitution does not mean any addition to, subtraction from, change in, or alteration or revision of this Constitution. Such a meaning cannot be gathered either from any analytical definition nor from any proper construction of the instrument. Such an interpretation renders the word "amendment" meaningless and of no intendment, and in effect eliminates it. Had there been any purpose to authorize Congress and the Legislatures of three-fourths of the States, mere officials, to add to, subtract from, change, alter, or revise the Constitution, so authoritatively established by the people, Article V would have clearly expressed that intent by including those terms. The word "amendment" is a technical word of common law significance and means simply "the correction of an error committed in a process." Amendments are thus limited to the correction of errors committed in the framing of the Constitution. It is

the only word that is appropriate in connection with an instrument of limited scope, powers and jurisdiction.

Third. The defendants contend that the amending function as a substantive power is unlimited, with the single exception "that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To this the complainant makes answer that the amending function is limited, both by its nature and by other constitutional limitations. The exceptions set forth in the original instrument "that no amendment, which may be made prior to the year one thousand eight hundred and eight, which in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate," are exceptions from a class to which amendments applied. That class included all articles and sections of the Constitution. The amending function properly construed is unlimited as to them, with the exceptions as stated.

Fourth. The defendants contend that if this Court should determine that a proposal by Congress of an "amendment to this Constitution," as above defined, was not a proposal of an "amendment to this Constitution" within the purview of Article V, it would be equivalent to the assumption of a veto by this Court upon an unlimited power of Congress.

To this the complainant makes answer that it is the province of this Court to interpret and construe the Constitution of the United States. Congress is the creature and not the creator of the Constitution. If this Court may not interpret the words and construe the clauses in Article V, then Congress and the Legislatures of three-fourths of the States, mere officials, may ignore all constitutional limi-

tations and may exert the powers of complete sovereignty. Usurpation may thrive unchecked.

Fifth. The defendants contend that whatever the proposal by Congress, whether an addition to, a subtraction from, a change in, or an alteration or revision of this Constitution, the fact that Congress has made such proposal constitutes it *ipso facto* a valid and unassailable "amendment to this Constitution;" and that, therefore, this Court has no jurisdiction in any controversy respecting any proposal by Congress of a proposition as an "amendment to this Constitution," with the single exception "that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To this the complainant makes answer that Congress is not omnipotent; that a proposal by Congress is not an "amendment to this Constitution" simply because it is proposed by Congress as such; that the conclusion to which the defendants' argument leads eliminates the word "amendment" from Article V, denies the right of this Court to interpret and construe that Article, and in effect overthrows every constitutional restraint that was designed to protect the State or the individual. Such a view of the amending function can only lead to tyranny and oppression. It is the clear duty of this Court to keep Congress in its proposals of "amendment to this Constitution" within the scope and jurisdiction of federal authority, and by so doing maintain that line of division between the Federal and State powers, which was so clearly marked out by the Constitution and which has for so many years ensured the harmonious operation of our dual system of government,—ordained and established as perpetual.

The theory of amendment which the defendants thus present is new in constitutional law. That it has been

pressed so far compels consideration and necessitates refutation. It could not have been deduced from any decisions of this Court, nor from any other authoritative source. It arises solely from the requirements of the case at issue, for the nature of the so-called Amendment is such that nothing short of the extreme view here advanced could justify or support it. The doctrine is so subversive of fundamental principles that its acceptance would bring about a constitutional revolution. It would convert the sovereignty of the people into a sovereignty of officials. It would endanger the guaranties of civil liberty and of those innumerable rights that have been inherited from the common law since the time of Magna Charta. Under its application the boundary established by the Constitution between Federal and State authority could be shifted at will, as officials might be influenced by political cowardice or expediency. In fact, all power might be absorbed by the Federal Government and the States become dependencies, States only in name, for the mere purpose of having equal representation in the Senate. This cause, therefore, will serve its purpose if it brings to the attention of this Court the serious danger that threatens the cherished principles of the Constitution and the perpetuity of free government thereunder.

(6) Established Principles.

As preliminary to a discussion of that particular article (Article V) upon which the defendants rest their doctrine that the Federal Government, by the amending function, may invade the powers and jurisdiction of a State government, it may be well to consider what deductions may be fairly drawn from the origin and nature of the Constitution and the relations which were established thereunder between

Nation and State. We are not led to this consideration by any doubt or uncertainty as to the principles to be deduced therefrom, for these principles have long been recognized and heretofore regarded as controlling. The fact that defendants' doctrine runs counter to them necessitates some inquiry as to their validity and binding force.

The assertion by the American colonies that they of right possessed full legislative powers in all matters and concerns relating to their internal affairs and the denial of these rights by the Crown and Parliament brought about the Revolution. Mr. Madison said in his Report on the Virginia Resolutions:

> "The fundamental principle of the revolution was, that the colonies were coordinate members with each other, and with Great Britain, of an empire united by a common executive sovereign but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British Parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the Revolution." *El. Deb.*, Vol. 4, p. 562.

The General Assembly of the Colony of Rhode Island severed all connection with the Mother Country on the 4th day of May, 1776, by virtue of an act providing "that in all commissions for officers, civil and military; and in all writs and processes in law, whether original, judicial or executory, civil or criminal, wherever the name and authority of the said King (George III) is made use of, the same shall be omitted; and in the room thereof, the name and authority of the Governor and Company of this colony, shall be sub-

stituted, in the following words, to wit: 'The Governor and Company of the English Colony of Rhode Island and Providence Plantations.'" The other colonies took the same course and on the 4th day of July, 1776, the United States, in Congress assembled, declared the thirteen united colonies free and independent States. In *Ware* v. *Hylton,* 3 Dall. 199, 224 (1796), Mr. Justice Chase said:

> "I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, *that each of them had a right to govern itself by its own authority, and its own laws, without any controul from any other power upon earth.* * * * I have ever considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments."

In March, 1781, the several States united in a League of Friendship for the "security of their liberty" under the Articles of Confederation. Under these Articles no State surrendered or delegated any power over its internal affairs and civil institutions, and it was expressly provided by Article 2 of said Articles of Confederation that "each State retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled." In *Gibbons* v. *Ogden,* 9 Wheat, 1, 187 (1824), Mr. Chief Justice Marshall observed: "As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its con-

struction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. *This is true.*" The powers conferred upon Congress under the Articles of Confederation were chiefly those which were formerly regarded as prerogatives of the Crown and which had fallen in by the Revolution. They did not relate in any manner to the government of the internal affairs of the States, nor did they include even the right to tax or to regulate commerce, which were considered as appurtenant to legislative sovereignty.

The weaknesses of the government under the Articles of Confederation soon became manifest. The central government had no authority to enforce compliance with its requisitions and the States regarded them as less obligatory after the termination of the war. Congress was powerless to comply with treaty obligations. It was beyond the scope of its authority to protect American interests by trade regulations, either foreign or between the States. Credit and confidence had been impaired by the issue of paper money. The Confederation was bankrupt and even unable to pay the interest on its foreign debt. The States were circumscribed with enemies from Maine to Georgia. Foreign aggression was feared and there was deep-seated dread of insurrection and anarchy. The defects in the system then existing were variously stated in the Federal and State conventions, and however these defects were set forth, *no reference was made to any incompetency of the States in the management of their internal and domestic affairs, nor to any design or intent of intrusting those affairs to the Federal Government.* A single quotation will suffice. Mr. Thatcher, in the Massachusetts Convention, thus described the situation:

"On the one hand, the haughty Spaniard has deprived us of the navigation of the River Mississippi; on the other, the British nation are, by extravagant duties, ruining our fishery. Our sailors are enslaved by the pirates of Algiers. Our credit is reduced to so low an ebb, that American faith is a proverbial expression for perfidy, as Punic faith was among the Romans. Thus have we suffered every species of infamy abroad, and poverty at home. Such, in fact, have been our calamities, as are enough to convince the most skeptical among us of the want of a general government, in which energy and vigor should be established, and at the same time, the rights and liberties of the people preserved. * * * In some states, laws were made directly against the treaty of peace; in others, statutes were enacted which clashed directly against any federal union; new lands sufficient to discharge a great part of the Continental debt intruded upon by needy adventurers; our frontier settlements exposed to the ravages of the Indians; while the several states were unable or unwilling to relieve their distress. Lay all those circumstances together, and you will find some apology for those gentlemen who framed this Constitution. I trust you may charitably assign other motives for their conduct, than a design to enslave their country, and to parcel out for themselves its honors and emoluments." El. Deb., Vol. 2, pp. 143, 144.

It is generally recognized that necessity alone brought the statesmen together at Philadelphia, and occasioned the abandonment of a system that had proven so defective and the creation of a new form of government. The task was prodigious. The prevailing temper of the time cannot be overlooked. "It is universally understood, it is a part of the history of the day," remarked Mr. Chief Justice Marshall, in *Barron* v. *Baltimore,* 7 Pet. 243, 250 (1833), "that the great revolution which established the Constitution of the United States was not effected without immense opposi-

tion. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty." In the Pennsylvania Convention, Mr. Wilson, afterwards Mr. Justice Wilson of this Court, remarked: "The citizens of the United States, however different in some other respects, are well known to agree in one strongly-marked feature of their character,—a warm and keen sense of freedom and independence. This sense has been heightened by the glorious result of their late struggle against all the efforts of one of the most powerful nations of Europe. It was apprehended, I believe, by some, that a people so highly spirited would ill brook the restraints of an efficient government." El. Deb., Vol. 2, p. 420.

(A) All Sovereignty Resides in the People.

There is no principle better established than that our governments in Nation and State are governments of the people. The people possess all sovereign power. Constitutional government is based upon such power as the people have designated shall be exercised by their representatives under written instruments. The Federal Constitution therefore was submitted for ratification directly to conventions to be chosen by the people. The Legislatures were regarded as incompetent to act. The principle was clearly stated by Col. Mason and Mr. Madison in the course of debate upon the question of submission.

> "Col. Mason considered a reference of the plan to the authority of the people as one of the most important

and essential of the resolutions. The legislatures have no power to ratify it. They are the mere creatures of the state constitutions, and cannot be greater than their creators. And he knew of no power in any of the constitutions—he knew there was no power in some of them—that could be competent to this object. Whither, then, must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that *this doctrine should be cherished, as the basis of free government.*" El. Deb., Vol. 5, p. 352.

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and *it would be a novel and dangerous doctrine, that a legislature could change the constitution under which it held its existence.* There might indeed be some constitutions within the Union, which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty,* and a *constitution.*" El. Deb., Vol. 5, p. 355.

That all authority is derived from the people was early expressed by Mr. Chief Justice Marshall, in the case of *McCulloch* v. *Maryland,* 4 Wheat 316, 403 (1819), and although the principle is clear, his expression of it may be recalled:

"The convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a

convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? *No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State Governments.

"From these Conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. *It required not the affirmance, and could not be negatived, by the State governments.*" . . .

"But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, *the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.* The government of the Union, then (whatever may be the influence of this fact on the case) is, emphatically, and truly, a government of the people. In form and

substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

(B) The Federal Government Limited to Prevent Encroachments.

The submission of the Constitution to the people met the strongest opposition and divided the country into two great parties. Their differences turned chiefly on the construction of the instrument. The Federalists claimed that the Constitution was a special delegation of power, differing from the State constitutions in which the delegation was general; that the Federal Government could exercise only such powers as were expressly delegated; that the people of a State would be affected only so far as they were restrained by the instrument or their powers surrendered therein by express delegation. The Anti-Federalists replied that while the intent might have been to create a limited government, the document itself did not so declare; that the powers delegated to the Federal Government might be broadly construed, and through construction and implication, encroachment might take place upon the sovereign powers of the people of a State; that amendments were necessary to place express limitations upon the Federal Government and to mark the boundaries which should separate Federal and State authority; and therefore they insisted that a bill of rights should be incorporated into the instrument, "bill of rights" being the familiar term for limitations and restraints upon government.

A definite limitation of Federal power to prevent encroachment upon State power was intended by all factions.

"This balance between the national and state governments", said Mr. Hamilton, "ought to be dwelt on with peculiar attention, as it is of the utmost importance." That this balance was absolutely essential in a dual system was well expressed by Mr. Smith in the New York convention:

> "It is necessary that the powers vested in government should be precisely defined, that the people may be able to know whether it moves in the circle of the Constitution. It is the more necessary in governments like the one under examination, because Congress here is to be considered as only a part of a complex system. The state governments are necessary for certain local purposes; the general government for national purposes. The latter ought to rest on the former, not only in its form, but in its operations. It is therefore of the highest importance that *the line of jurisdiction should be accurately drawn.*" El. Deb., Vol. 2, p. 332.

In North Carolina Mr. Iredell, speaking to this point, asserted the purpose accomplished by the enumeration of powers in the instrument:

> "In my opinion, there ought to be a line drawn, as accurately as possible, between the power which is given and that which is retained. In this system, *the line is most accurately drawn by the positive grant of the powers of the general government.*" El. Deb., Vol. 4, p. 10.

And in Pennsylvania Mr. Wilson expressed the same view:

> "Sir, I think there is another subject with regard to which this Constitution deserves approbation. I mean *the accuracy with which the line is drawn* between the powers of the general government and those of the particular state governments. * * * It is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire.

> Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible." El. Deb., Vol. 2, p. 481.

In almost every convention, however, by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government,—not against those of the local governments. *Barron* v. *Baltimore,* 7 Peters, 243, 250 (1833). In the Pennsylvania Convention, Mr. Wilson, who had also been a member of the Convention which drafted the Constitution, said:

> "I cannot say, Mr. President, what were the reasons of every member of that Convention for not adding a bill of rights. I believe the truth is, that such an idea never entered the mind of many of them. I do not recollect to have heard the subject mentioned till within about three days of the time of our rising; and even then, there was no direct motion offered for any thing of the kind. I may be mistaken in this; but as far as my memory serves me, I believe it was the case. *A proposition to adopt a measure that would have supposed that we were throwing into the general government every power not expressly reserved by the people, would have been spurned at, in that house, with the greatest indignation.* * * * But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the govern-

ment, and the rights of the people would be rendered incomplete." El. Deb., Vol. 2, p. 435.

The same position was taken by Mr. Iredell, Mr. MacLaine and Mr. Johnson in North Carolina: El. Deb., Vol. 4, pp. 140, 142, 148, 160, 161; by Mr. Pitney in South Carolina: El. Deb., Vol. 4, p. 315; by Governor Bowdoin and Mr. Parsons in Massachusetts: El. Deb., Vol. 2, pp. 87, 93; by Governor Randolph, Mr. Lee and Mr. Nicholas in Virginia: El. Deb., Vol. 3, pp. 186, 203, 451, 464; and by many others. The more cautious delegates to the State conventions, however, were extremely jealous of their newly won independence and liberty and were not satisfied with the logic of the argument; and insisted that there should be no ground for any future pretense for the assumption of federal power by implication and that there should be a clear and unequivocal statement in the instrument that all powers not expressly granted were to be retained. Mr. Madison, Federalist, No. 45. In speaking to this point Mr. Spencer, in the North Carolina Convention, observed:

"I know it is said that what is not given up to the United States will be retained by the individual states. I know it ought to be so, and should be so understood; but, sir, *it is not declared to be so.* In the Confederation it is expressly declared that all rights and powers, of any kind whatever, of the several states, which are not given up to the United States, are expressly and absolutely retained, to be enjoyed by the states. There ought to be a bill of rights, in order that those in power may not step over the boundary between the powers of government and the rights of the people, which they may do when there is nothing to prevent them. They may do so without a bill of rights; notice will not be readily taken of the encroachments of rulers, and they may go a great length before the people are alarmed. Oppression may therefore take place by degrees; but

> *if there were express terms and bounds laid down, when those were passed by, the people would take notice of them,* and oppressions would not be carried on to such a length. I look upon it, therefore, that there ought to be something to confine the power of this government within its proper boundaries." El. Deb., Vol. 4, p. 137.

In Virginia, Mr. Henry asserted that "a general positive provision should be inserted in the new system, securing to the states and the people every right which was not conceded to the general government, and that every implication should be done away with." El. Deb., Vol. 3, p. 150. In Massachusetts, Mr. Thompson inquired: "Where is the bill of rights which shall check the power of this Congress; which shall say *'Thus far shall ye come and no farther'?"* El. Deb., Vol. 2, p. 80. In Virginia, Mr. Mason declared that *artful sophistry and evasion* could not satisfy him; that he could see no clear distinction between rights relinquished by a positive grant and lost by implication; that there was a clause in the Confederation reserving to the States respectively every power, jurisdiction and right not expressly delegated to the United States, and that this clause had never been complained of, but approved by all. He further remarked:

> "We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground. We wish to give the government sufficient energy, on real republican principles; but we wish to withhold such powers as are not absolutely necessary in themselves, but are extremely dangerous. * * * *We ask such amendments as will point out what powers are reserved to the state government, and clearly discriminate between them and those which are given to the general government, so as to prevent future disputes and clashing of interests.* Grant

> us amendments like these, and we will cheerfully, with our hands and hearts, unite with those who advocate it, and we will do everything we can to support and carry it into execution." El. Deb., Vol. 3, p. 271.

The ratification of the Constitution in most of the States was accompanied by an explanatory statement that favorable action was taken in full reliance that amendments would be promptly made to meet the objections which had been raised. Of the numerous amendments proposed by the States, that relating to the limitation of federal power was deemed the most essential. Massachusetts demanded: "That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised." From Maryland the proposal read: "That Congress shall exercise no power but what is expressly delegated by this Constitution." The proposal from New York was: "That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective states, to be by them exercised." From North Carolina: "That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government." From Rhode Island: "The United States shall guarantee to each state its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States." The demand of Pennsylvania was more at length:

> "That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the

> Union, under color or pretense of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."

At the First Session of Congress under the new government Mr. Madison brought forward proposals of amendments to the Constitution in accordance with the assurance which he had given in the Virginia Convention. He thus carried out a tacit agreement through which ratification in several of the States had been procured. In bringing forward these amendments, he said:

> "I confess it has already appeared to many, in point of candor and good faith, as well as policy, to be incumbent upon the first Legislature of the United States, at their first session, to make such alterations in the Constitution as will give satisfaction, without injuring or destroying any of its vital principles." * * *
>
> "I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States. *Perhaps words which may define this more precisely than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it."* Gales & Seaton's Debates, Vol. 1, pp. 458, 733.

Under the direction of Mr. Madison twelve amendments were agreed upon and proposed to the Legislatures of the several States, the preamble of the joint resolution of submission reading:

> "The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added;* And as extending the ground of public confidence in the government, will best ensure the beneficent ends of its institution: Resolved, etc."

Of the twelve proposals submitted ten were ratified and these ten Amendments have ever been regarded as virtually a part of the original document and they have always been construed as declaratory of its meaning and as imposing a definite limitation upon the construction of its powers. The Federal Government therefore is limited not only by the enumeration of the particular powers delegated, but also by the express limitations contained in the first ten Amendments.

Mr. Justice Story in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 325 (1816):

> "It is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.
>
> *"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution,* which declares, that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

> "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and *the powers actually granted, must be such as are expressly given, or given by necessary implication.*"

Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 405 (1819):

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. *That principle is now universally admitted.*"

(C) The Federal and State Governments are Independent Sovereignties, Have Distinct and Separate Jurisdictions and Move in Entirely Different Spheres.

The constitutional limitations having been definitely established, either in the instrument itself or by Amendments, the Federal and State governments have been regarded from the beginning as distinct and separate. Their powers are for different purposes. Their territorial or objective jurisdictions are well defined. They move in entirely different spheres. Each in its sphere is independent and sovereign. The Federal Government derives its power from the people of the United States. A State government derives its power from the sovereign people of the State. As Mr. Justice Iredell, in *Chisholm* v. *Georgia,* 2 Dall. 419, 448 (1793), remarked: "A State does not owe its origin to the Government of the United States, in the highest or in any

of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people." He had previously stated in the same case (p. 435): "Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. *Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them.* Of course the part not surrendered must remain as it did before."

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 410 (1819):

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and *neither sovereign with respect to the objects committed to the other.*"

Mr. Chief Justice Taney, in *Ableman* v. *Booth,* 21 How. 506, 516 (1858):

> "The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, *as if the line of division was traced by landmarks and monuments visible to the eye.*"

Mr. Justice Bradley, in *Claflin* v. *Houseman,* 93 U. S. 130, 137 (1876) :

> "It is true, the sovereignties are distinct, and *neither can interfere with the proper jurisdiction of the other,* as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth,* 21 How. 506."

Mr. Justice Nelson, in *Collector* v. *Day,* 11 Wall. 113, 124 (1870) :

> "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but *the States within the limits of their powers not granted, or in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.*"

Mr. Justice Waite, in *United States* v. *Cruikshank,* 92 U. S. 542, 550 (1875) :

> "The people of the United States resident within

> any State are subject to two governments: one State and the other National; *but there need be no conflict between the two. The powers which one possesses, the other does not.* They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad."

Mr. Justice Bradley, in *Claflin* v. *Houseman,* 93 U. S. 130, 136 (1876):

> "Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject matter."

The Federal and State governments are not only distinct and separate in their objects and in the operation of their powers, but each has its own citizenship, its own electorate, its own agencies, and each is limited to its own powers and jurisdiction in securing and protecting the rights and privileges of its own people. In *United States* v. *Cruikshank, supra,* Mr. Justice Waite clearly pointed out the limitations upon the operation of each government, determined by their respective powers and jurisdiction. He there said (p. 549):

> "We have in our political system a Government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-house Cases,* 16 Wall. 74.
>
> "Citizens are the members of the political com-

munity to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. *The duty of a government to afford protection is limited always by the power it possesses for that purpose.* * * *

"Within the scope of its federal powers, as enumerated and defined, it is supreme and above the States; but *beyond, it has no existence.* It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. *It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.*"

(D) The Police Power Exclusively in the States.

"By the public police and economy," says Blackstone, "I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." Commentaries, Sharswood's Ed., Vol. 2, Bk. 4, p. 162. The police power is inseparable from territorial sovereignty and through that power a State

administers the common law with such modifications as the changing social conditions of the time demand. The common law was never incorporated in the Federal Constitution nor its administration intrusted to federal authority. Mr. Madison, the Father of the Constitution, in his elaborate Report on the Virginia Resolutions, said:

> "From the review thus taken of the situation of the American colonies prior to their independence; of the effect of this event on their situation; of the nature and import of the Articles of Confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the federal government, and in superseding the authorities of the state governments,—the committee feel the utmost confidence in concluding that *the common law never was, nor, by any fair construction ever can be deemed a law for the American people as one community;* and they indulge the strongest expectation that the same conclusion will be finally drawn by all candid and accurate inquirers into the subject. It is, indeed, distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and *a law that would sap the foundation of the Constitution as a system of limited and specified powers.* A severer reproach could not, in the opinion of the committee, be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them." El. Deb., Vol. 4, p. 566.

As to the nature of the police power, Mr. Justice Miller, in the Slaughter-House Cases, 16 Wall. 36, 62 (1872), remarked:

> "This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. *Com.* v. *Alger,* 7 Cush. 84.
>
> "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.
>
> " 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.' *Thorpe* v. *Rutt. & B. R. R. Co.,* 27 Vt. 149. * * *
>
> "In *Gibbons* v. *Ogden,* 9 Wheat., 203, Chief Justice Marshall, speaking of inspection laws passed by the States, says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government—*all which can be most advantageously administered by the States themselves.* Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation.'

"*The exclusive authority of state legislation over this subject* is strikingly illustrated in the case of *N. Y.* v. *Miln,* 11 Pet. 102. * * * To the same purpose are the recent cases of the *The License Tax,* 5 Wall. 471, and *U. S.* v. *Dewitt,* 9 Wall. 41."

Another illuminating definition of this power is given by Mr. Justice Gray, in *Leisy* v. *Hardin,* 135 U. S. 100, 127 (1889):

"By the Tenth Amendment, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

"Among the powers thus reserved to the several States is what is commonly called the police power—*that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime.*

" 'The police power belonging to the States in virtue of their general sovereignty,' says Mr. Justice Story, delivering the judgment of this court, 'extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. *Prigg* v. *Pennsylvania,* 16 Pet. 539, 625. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire-test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters-patent from the United States. *United States* v. *Dewitt,* 9 Wall. 41; *Patterson* v. *Kentucky,* 97 U. S. 501.

"The police power includes all measures for the protection of the life, health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression

of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. *Slaughter-House Cases,* 16 Wall. 36, 62, 87; *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659; *Phalen* v. *Virginia,* 8 How. 163, 168; *Stone* v. *Mississippi,* 101 U. S. 814.

"This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is *inalienable.* As was said by Chief Justice Waite, referring to earlier decisions to the same effect, '*No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.*' *Stone* v. *Mississippi,* 101 U. S. 814, 819; *Butchers Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 753; *New Orleans G. Co.* v. *Louisiana L. & H. Co.,* 115 U. S. 650, 672; *New Orleans* v. *Houston,* 119 U. S. 265, 275."

"The police of a State," says Judge Cooley, "embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." The same author adds: "In the American constitutional system, the power to establish the ordinary regulations of police has been left

to individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States.* *U. S.* v. *Dewitt,* 9 Wall. 41; *U. S.* v. *Reese,* 92 U. S. 214; *U. S.* v. *Cruikshank,* 92 U. S. 542; *Keller* v. *U. S.,* 213 U. S. 138." Cooley, Const. Lim., 7th Ed., pp. 829, 831.

This police power of a State has been particularly sustained in its application to the manufacture, sale and transportation of the subject matter of the so-called Amendment, and it has been repeatedly held to be an absolute and exclusive power in the State.

Crane v. *Campbell,* 245 U. S. 304 (1917).
Purity Extract Co. v. *Lynch,* 226 U. S. 192 (1912).
Crowley v. *Christensen,* 137 U. S. 86 (1890).
Kidd v. Pearson, 128 U. S. 1 (1888).
Mugler v. *Kansas,* 123 U. S. 623 (1887).
Beer Co. v. *Mass.,* 97 U. S. 25 (1878).
Bartemeyer v. *Iowa,* 18 Wall. 129 (1874).

Mr. Chief Justice Chase, in speaking of the internal commerce and domestic trade of a State, in the *License Tax Cases,* 5 Wall. 462, 470 (1866), said:

> "Over this commerce and trade (the internal commerce and domestic trade of the States) Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the Legislature. *The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."*

Mr. Justice Matthews, in *Bowman* v. *Chicago & Northwestern Railway Co.,* 125 U. S. 465, 493 (1888):

> "It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution.

Mr. Justice Lamar, in *Kidd* v. *Pearson,* 128 U. S. 1, 23 (1888):

> "We have seen that whether a State in the exercise of its *undisputed* power of local administration, can enact a Statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, *is not longer an open question before this Court.*"

In *Leisy* v. *Hardin,* 135 U. S. 100, 122 (1889), Mr. Chief Justice Fuller, in delivering the opinion of the Court, remarked:

> "These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government. * * *
>
> "Undoubtedly, it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may

> properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety. * * *"

Mr. Justice Gray, in dissenting in *Leisy* v. *Hardin, supra,* but not with reference to the principle here discussed, said:

> "The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the Legislatures of the several States, and can be judiciously and effectively exercised *by them alone,* according to their views of public policy and local needs; and *cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.*"

Mr. Justice Brewer, in *In re Heff,* 197 U. S. 489, 505 (1905), speaking for the Court, remarked:

> "The general police power is reserved to the States, subject, however, to the limitation that in its exercise the state may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And *so far as it is an exercise of the police power it is within the domain of State jurisdiction.*"

(E) No Police Power in Federal Government.

Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments, or produce any conflict between the two governments in the exercise of their respective powers,

need occur. There is always a division line between a Federal and a State power. As Mr. Chief Justice Marshall said in *Gibbons* v. *Ogden, supra*:

> "All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

Thus Congress under its power to regulate commerce between the States has enacted:

(a) The Wilson Act (4 Fed. Stat. Ann. 2d ed., p. 585; U. S. Statutes, August 8, 1890), sustained in *In re Rahrer,* 140 U. S. 545;

(b) The Webb-Kenyon Act (1914 Sup. to Fed. Stats. Ann., p. 208; 4 Fed. Stats. Ann., 2d ed., p. 593; March 1, 1913), sustained in *James Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; and

(c) The Reed Amendment (U. S. Fed. Stat. Ann. 1918 Supp., p. 394; Sec. 5 of Act of March 3, 1917. See *McAdams* v. *Wells Fargo & Co.,* 249 Fed. 175; *U. S.* v. *Mitchell,* 245 Fed. 601.

This legislation could only be supported under the power of Congress to regulate interstate commerce. In each case there was a clear intent to recognize the right of the State to exercise its police power to the full and to furnish every federal assistance to that end. But Congress has no police power and may not regulate the subject matter. Its legislation may effect the subject matter indirectly through its power over interstate commerce. But the police power resides with the States alone, as Mr. Justice Harlan re-

marked in the case of *Missouri, Kansas & Texas Railway Co.* v. *Haber,* 169 U. S. 613, 628 (1898) :

> "This Court, while sustaining the power of Congress to regulate commerce among the States, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with Acts of Congress passed in pursuance of that instrument."

In the case of *In re Heff,* 197 U. S. 489 (1905), where it was held that Congress could not penalize the sale of liquor within a State to an Indian who had acquired the privilege of State citizenship, Mr. Justice Brewer, in delivering the opinion of the Court, said :

> "It will not be doubted that an Act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction, and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. *There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."* p. 505.

It is beyond dispute that the police power is not one of the enumerated powers delegated to the Federal Government by the Constitution. It is a power inherent in the State which has never been surrendered. It is indispensable to community government and inseparable from territorial sovereignty. In the recent case of *Hamilton* v. *Kentucky D. & W. Co.,* (Dec. 1919), Mr. Justice Brandeis said :

> *"That the United States lacks the police power and*

that this was reserved to the States by the Tenth Amendment is true."

Keller v. *United States,* 213 U. S. 138 (1908);
United States v. *Dewitt,* 9 Wall. 41 (1870).

(7) Article V Should be Construed as Consistent with These Principles.

The foregoing principles, which have been deduced by this Court from the origin and nature of the Constitution and the relations which were established thereunder between the Federal and State governments, can no longer be regarded as permanent if the doctrine which is advanced by the defendants in this cause be accepted as correct. The first ten Amendments were positive limitations upon all federal powers under the Constitution. If the amending function in Article V is not subject to the limitation of the Tenth Amendment, it is no more subject to the limitations of the first nine Amendments. Of what value then are all those rights, secured to the individual under the constitution of a State? Rhode Island first established the principle of religious liberty, and that principle may be threatened. Under the guise of amending the Constitution, Congress and the Legislatures of three-fourths of the States may abridge the freedom of speech and of the press, and the right of assembly, and of petition for redress of grievances; may violate the right of the individual to be secure in his person and effects against unreasonable searches and seizures; may introduce the most summary processes and proceedings in criminal cases and ignore every right of an accused; and may even deprive one of life, liberty or property without due process of law, and take private property for public use

without just compensation. If the amending function is limited by some of these first ten Amendments and not by others of them, where is the line to be drawn? And if no line can be drawn, then all the first ten Amendments are limitations upon the amending function, or none of them are.

The defendants in urging that Article V should be construed as delegating a substantive power to add to, subtract from, change, alter, or revise this Constitution upon any proposal by Congress, ignore the historical travel of constitutional development. They entirely misconceive the plan and scope and purpose of the Federal Constitution. Their theory would result in the overthrow of all those barriers that were so wisely erected for the protection of civil liberty. Even the present application of the doctrine fundamentally alters the relation of the States to the Federal Government, and even threatens the existence and autonomy of the States, for any government whose powers are subject to the control of another and distinct government can exist only at the mercy of that other government. "Without the States in union there could be no such political body as the United States."

A construction therefore of Article V which would give support to the doctrine which the defendants advance would not only run counter to the views heretofore entertained by our Courts and jurists, but would definitely tend to the destruction of the States, and thereby of the Union itself. In this connection we may quote the apt words of Mr. Justice Miller, in the *Slaughterhouse Cases, supra*:

> "The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these

> consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

We are not wholly dependent however in this case upon the argument drawn from the consequences of defendants' doctrine. Strong as that argument is, there are others equally cogent. There is nothing in the wording of Article V which directly provides that the powers reserved to the States are subject to the control of the Federal Government through the process of amendment; nor is there anything in Article V, or in any other part of the Constitution from which may be inferred such an inconsistent and extraordinary purpose. All reasoning and all deductions are to the contrary. If the amending function in the Federal Constitution had any relation to the constitutions of the several States or to the powers which were reserved to the several States, words would have been employed in Article V clearly and directly to express that intent. Mr. Chief Justice Marshall pointed out in *Barron* v. *The Mayor and City Council of Baltimore,* 7 Pet. 243 (1833), that wherever in the original Constitution there was an inhibition intended to act on State powers, words were employed which directly expressed that intent. That case involved the contention that certain state legislation was in violation of the Fifth Amendment to the Federal Constitution. Holding that that Amendment

was a limitation upon the Federal and not upon the State governments and that the same rule of construction should be applied to the Amendments as to the original Constitution, the Chief Justice said:

> "It would be tedious to recapitulate the several limitations on the power of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. *The question of their application to States is not left to construction. It is averred in positive words.*
>
> "If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; if *in every inhibition intended to act on State power, words are employed which directly express that intent,* some strong reason must be assigned for departing from this same and judicious course in framing the amendments, before that departure can be assumed. We search in vain for that reason.
>
> "Had the people of the several States, or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, *the remedy was in their own hands,* and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. *The unwieldly and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself.* Had the framers of these amendments intended them to be limitations on the powers of the State governments *they*

would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." p. 249.

The framers of the Constitution, however, did not leave such an important matter in doubt. We indulge in the confidence that a fair and natural construction of the provisions of Article V will lead to a complete refutation of defendants' theory that the Federal Government, through the amending function, may invade the powers and jurisdictions of the States.

(8) The So-called Eighteenth Amendment is Not an Amendment Within the Purview of Article V.

Mr. Justice Brewer, in delivering the opinion of the court, in the case of *South Carolina* v. *United States,* 199 U. S. 435, 447, (1905) said:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still

within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Scott* v. *Sandford,* 19 How. 393, 426:

"'It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'

"It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them; putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden,* 9 Wheat. 1, 188, well declared:

> "'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.'

After quoting the above passage from the case of *Gibbons* v. *Ogden,* in his work on Constitutional Limitations, 7th Ed., p. 93, Judge Cooley remarks:

> "This is but saying that no forced or unnatural construction is to be put on their language; and it seems so obvious a truism that one expects to see it

universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim."

(A) Selection of the Word Amendment by Mr. Madison.

The principle of amendment in the Federal Constitution originated in the thirteenth resolution of the Virginia Plan. *Farrand,* Vol. 1, p. 22. The Virginia Plan was drafted by Mr. Madison after months of labor prior to the assembling of the delegates at Philadelphia. *Taylor*: Origin and Growth of Am. Const., pp. 550-561. It was presented to the Convention by Governor Randolph, as the head of the Virginia delegation. It consisted of a set of resolutions, the thirteenth of which read as follows: "That provision ought to be made for the *amendment* of the Articles of Union whensoever it shall seem necessary." In passing, it may be pointed out that it was the particular Articles of Union that were to be amended. The sense was not changed when later the words "this Constitution" were substituted for "Articles of Union." The word *amendment* was so fully understood as to its import and apparently regarded as so appropriate to the context, that during the weeks of debate in which every word and phrase was scrutinized, no criticism was passed upon it. There is no evidence that any other word or words were considered in this connection. There was before the Committee of Detail a document in the handwriting of Governor Randolph which employed the phrase "alter or revise", but no change was reported by the Committee of Detail. *Farrand,* Vol. 2, pp. 137, 148. The exist-

ence of this document furnishes ample proof that its author did not draft the Virginia Plan in which *amendment* was more accurately and understandingly used.

The principle of amendment was not new in American Constitutions. There were several precedents which undoubtedly served as a guide, both in the preparation of the Virginia Plan and in the discussion of it in Convention. As early as 1683 the Pennsylvania Frame of Government and the Pennsylvania Act of Settlement contained within themselves a provision for modification. A similar provision was incorporated in the Pennsylvania Frame of Government of 1696 and in the Pennsylvania Charter of Privileges of 1701. In each case the instrument provided that it should not be "altered, changed or diminished" without the consent of the Governor and six parts of seven of the Assembly.

Immediately after the Declaration of Independence all of the colonies, except Connecticut and Rhode Island, adopted new written Constitutions and in several of them provision was made in some form for modification of the instrument without entire revision. These Constitutions undoubtedly furnished a precedent for incorporating Article V in the Federal Constitution. The Constitutions of North Carolina of 1776, of New Jersey of 1776, of New Hampshire of 1776, and of South Carolina of 1776 contain no provision for change or amendment. In the Maryland Constitution of 1776 (Article 59) the words were "altered, changed or abolished". *Poore,* Vol. 1, pp. 817, 829. In the Delaware Constitution of 1776 (Article 30) the phrase was "altered, changed or diminished". *Poore,* Vol. 1, pp. 273, 278. The Constitution of George, adopted in 1777 (Article 63), provided only for "alterations". *Poore,* Vol. 1, pp. 377, 383. The South Carolina Constitution of 1778 (Article 44) uses the words "alter" and "change" in the same sense. Of more

direct bearing, however, than the preceding were the Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780. The provision of the former was copied in the Vermont Constitution of 1777, (*Poore,* Vol. 2, pp. 1857, 1865), and in the succeeding Vermont Constitutions of 1786 and 1793. The provision in the Massachusetts Constitution of 1780 was copied in the New Hampshire Constitution of 1784. *Poore,* Vol. 2, pp. 1280, 1293.

The Pennsylvania Constitution of 1776 provided for the election of a Council of Censors in every seventh year, composed of two persons in every city and county. Among the powers of this council was the following:

> "The said council of censors shall also have power to call a convention, to meet within two years after their sitting, if there appear to them *an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people*: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject." *Poore,* Vol. 2, pp. 1540, 1548.

This Pennsylvania Constitution makes a sharp distinction between amendments, additions and explanatory provisions. It also clearly indicates that amendments were to apply to the particular articles of the Constitution and that the amending function was not a matter of speculation, outside of the instrument and unrelated to it.

The Massachusetts Constitution of 1780, in Chapter 6, Article 10, provided:

> "In order the more effectually *to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary,* the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments. *Poore,* Vol. 1, pp. 956, 972.

The Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780 were the first to introduce the qualifying provision that no amendment should be made except in case of necessity. In the former the exigency was described as "an absolute necessity of amending" and in the latter "as from experience shall be found necessary." Without question the word "necessary" in Article V of the Federal Constitution had its origin in these provisions of the Pennsylvania and Massachusetts Constitutions. Benjamin Franklin, who sat in the Federal Convention, presided over the Assembly that framed the Pennsylvania Constitution of 1776.

The Articles of Confederation which became effective March 1, 1781, provided:

> "The Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any *alteration,* at any time hereafter, be made in *any* of them; unless such *alteration* be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislature of every State." Article 13.

Mr. Madison, therefore, had before him in drafting the

thirteenth resolution of the Virginia Plan and the delegates at Philadelphia had before them in considering and discussing that resolution the following words which had been employed in amendatory provisions of prior Constitutions: "amend", "alter", "change", "diminish", "abolish", "add", "explain" and "revise". It would appear pedantic to define and distinguish words of such diverse origin and different shades of meaning. A resort to any lexicon would suffice. The framers of the Constitution, having before them examples of the use of so many words of distinguishable conception, selected that word as expressive of their intent which was of them all the only one applicable to a limited Constitution. If "alter", "change", "diminish", "abolish", "add", "explain" and "revise" are words of broader and larger meaning, it is sufficient to say that neither this Court nor Congress can substitute either of those words for a word of more limited meaning used in the Constitution. As Mr. Chief Justice Taney said in *Passenger Cases,* 7 How. 283, 493 (1849): "Everyone will admit that a construction which substitutes a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority."

(B) The Derivative Meaning.

The derivative meaning of *amend* may throw some light upon the correct interpretation of that word in Article V. The underlying conception which occasioned its creation in the classical period of Latin writers may be gathered from its original verbal form, *ex-mendare,* (*e* or *ex*—from or out of; and *menda*—a fault, error or mistake.) It was from the first almost exclusively used with reference to an ailment of the body or to an error or mistake in a writing. Its

primary sense was an improvement in health or the removal of a defective quality from a written instrument. It was distinctively a qualitative word, referring to an existing substantive that had in it a quality that was subject to improvement. The element of removal or taking out of an existing quality of error was essential in its proper application. An amendment, therefore, in its derivative conception implies the relation of a bad and a better quality in an existing substantive, and the removal of the bad and the substitution of the better quality. It has no reference to any change in the purpose or identity of the substantive. The purpose of a written instrument may be the measure of its defective quality, but it is only the quality that is changed and not the purpose or identity. The primary meaning of the word as used today is still the derivative meaning. In distinguishing *amend* from the other words with which it is attempted to be synonymized, it may be observed in brief that *change* and *alteration* embrace any variation, irrespective of quantity or quality; that *addition* and *subtraction* relate only to quantity; that a *revision* is a pretentious process of reviewing the whole; and that an *amendment* is qualitative and is applicable only by reference and relation.

It would be the most serious error to confound these words or to employ them indiscriminately. "The acknowledged accuracy of the language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument." Mr. Justice McKinley in *Passenger Cases,* 7 How. 283, 451 (1849).

Merely as a literary production the Constitution has been regarded as a masterpiece of correct and exact expression. The accurate scholarship of those able and learned patriots who drafted the instrument would be lightly

esteemed if we were to interpret their words with any less care and precision than they exercised in the choice of them. The selection of the word *amendment* in Article V was well considered and discriminating. It conveys an exactness of thought. Its use as a technical term in the English common law confirmed and established its derivative meaning as applied to legal documents. The common law merely gave to the term a definiteness of application.

(C) The Meaning at Common Law.

It is well known that the framers of the Constitution confined themselves so far as possible to words and phrases which had acquired by long usage in legal procedure a definite significance; and it has been said that the Constitution could not be fairly interpreted or well understood without tracing the history of such words and phrases through the succeeding stages of development of the common law.

In the case of *South Carolina* v. *United States,* 199 U. S. 437, Mr. Justice Brewer remarked:

> "One other fact must be borne in mind, and that is that in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in *Smith* v. *Alabama,* 124 U. S. 465, 478:
>
> " 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.'
>
> "And by Mr. Justice Gray in *United States* v. *Wong Kim Ark,* 169 U. S. 649, 654:
>
> " 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the

framers of the Constitution. *Minor* v. *Happersett,* 21 Wall. 162; *Ex parte Wilson,* 114 U. S. 417, 422; *Boyd* v. *United States,* 116 U. S. 616, 624, 625; *Smith* v. *Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent. Com. 336; Bradley, J., in *Moore* v. *United States,* 91 U. S. 270, 274.' "

Procedure at common law in its early stage frequently defeated its own end by being governed more by the letter than by the spirit. This strict adherence to form occasioned great injustice whenever a litigant took advantage of some immaterial error committed in a pleading or process. To remedy this condition Parliament began to legislate at an early date. Cap. XI, 14 Edward III (1340) dealt with misprisions of clerks and provided that "no process shall be annulled, or discontinued, by mistaking in writing one syllable or one letter, too much or too little; but as soon as the thing is perceived, by challenge of the party, or in other manner, it shall be hastily *amended* in due form, without giving advantage to the party that challengeth the same because of such misprision." A diversity of opinion arose as to whether the *amendment* could be made both before and after judgment. "To put the thing in more open knowledge," Cap. IV, 9 Henry V (1421) authorized the justices before whom any plea, record, or process is depending to *amend* such plea, record, or process as well after judgment as before. As this statute was to remain in force until the convening of the Parliament "that shall be first holden after the return of our sovereign lord the King into England from beyond the sea," it was determined by the death of King Henry V in France. By Cap. III, 4 Henry VI (1425), however, this amelioration in the practice was made permanent and "effectual in law to endure for ever."

The principle of amendment was extended by Cap. XII,

8 Henry VI (1429), and applied to writs of error and other certifications. No judgment or record was to be reversed or annulled by error in the certification and the judges were empowered to cure any variance and "to reform and *amend* in affirmance of the judgments." A more comprehensive statute (Cap. XV) was enacted in the same year. This related not only to depending records and processes, but to returns of officers. The judges were given discretion, "to be taken where they shall think needful," to make *amendment* by reason of any default or misprision in the returns of sheriffs, coroners, bailiffs, and other officers, whether the default or misprision was due to the clerks of court or to the officers themselves or to their clerks.

Cap. XXX, 32 Henry VIII (1540), in supporting judgments after verdicts, where misjoinder, mispleading, jeofail or other defect appeared, gave force to the legal fiction that the defect had been cured by an *implied amendment.* This statute recited that litigants had been "greatly delayed and hindered in their suits and demands, by reason of crafty, subtile and negligent pleadings, * * * in ministering of their declarations and bars, as also in their replications, rejoinders, rebutters, joining of issues, and other pleadings," and then provided that after verdict rendered judgment should be entered "according to the said verdict, without any reversal or undoing of the same by writ of error, or of false judgment, in like form as though no such default or negligence had ever been had or committed." Cap. XIV, of 18 Elizabeth (1576) also related to judgments after verdict, that they should not be "stayed or reversed by reason of any default in form, or lack of form, touching false Latin or variance from the register, or other defaults in form, in any writ original or judicial, count, declaration, plaint, bill, suit or demand, or for want of any writ original or judicial, or

by reason of any imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or by reason of any manner of default in process." Cap. XIII, 21 James I (1623) extended the doctrine in like cases by making it applicable to numerous other forms of variance and defects.

Cap. VIII, of 16 and 17 Charles II (1664) was directed against the dilatory and vexatious practice of securing a stay of execution by writ of error and *supersedeas,* based on some immaterial variance or defect. This statute provided that the variances and defects therein enumerated "and all other matters of like nature, not being against the right of the matter of the suit, nor where by the issue or trial are altered, shall be *amended* by the justices or other judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error." Cap. XVI, 4 Anne (1705), was entitled "An act for the Amendment of the Law, and the better Advancement of Justice." This statute dealt broadly with the practice of the court, simplified the procedure, and restricted dilatory pleadings. "The court shall give judgment according to the very right of the cause," the first section concludes, "without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer." Cap. XX, 9 Anne (1710), was an act "for rendering the proceedings upon writs of *mandamus,* and informations in the nature of a *quo warranto,* more speedy and effectual; and for the more easily trying and determining the rights of offices and franchises in corporations and boroughs." This was more special in its nature, and intended to cure the mischief of delay. Another statute of amendment was Cap. XIII, 5 George I

(1718). This was styled: "An act for the Amendment of Writs of Error; and for the further preventing the arresting or reversing of Judgments after Verdict." It provided: "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be *amended and made agreeable to such record.*"

These Statutes of Amendment and Jeofail, and the numerous cases involving the interpretation and application of them, established the principle of *amendment* as a legal doctrine. This is evident from the early law dictionaries. Not many are at hand, but the following references will show that there was complete unanimity as to the scope and meaning of the word as a legal term applied to Court procedure.

"A Law-Dictionary. Interpreting such difficult and obscure Words and Terms, as are found either in Our Common or Statute, Ancient or Modern Lawes." By Thomas Blount, Esq., of the Inner Temple, London, 1670.

> "*Amendment signifies the correction of an Error committed in a Process,* and espied before or after Judgment; and sometimes after the party seeking advantage by the Error. Brook, *titulo,* Error and Amendment."

"The Practical Register: or, A General Abridgment of the LAW, As it is now practised in the several Courts, &c." Collected by the Author, John Lilly, Gent., London, 1725.

> "*Amendment is, where Error is in the Process,* there the Judges may amend it after Judgment. But if there be Error in giving of the Judgment (viz. a wrong Judgment is given) there they cannot amend it, but the Party must bring his Writ of Error; but where the Fault appears to be in the Clerk who writ the Record, it may be amended."

"A Law Dictionary: or the Interpreter of Words and

Terms, used either in the Common or Statute Laws of Great Britain, and in Tenures and Jocular Customs." Printed by Nutt & Gosling, London, 1727.

> "*Amendment, Emendatio, Signifies in Common Law, a Correction of an Error committed in a Process,* and espied before Judgment, and sometimes after the Party's seeking advantage by the Error. *Terms de la Ley. Bro. Tit.* Amendment *per tot.* But if the Fault be found after Judgment given, the Party that will redress it, is driven to his Writ of Error. *Bro. Tit.* Error and amendment."

"The Common Law Common-Plac'd: Containing The Substance and Effect of all the Common Law Cases, &c." By Giles Jacob, Gent., London, 1733.

> "*Amendment is the Correction of an Error committed in Writs and Process of Courts, and other Law Proceedings.* In many cases Faults of Clerks, shall be amended: But original Writs are not amenable at Common Law; though judicial Writs have been often amended. A Declaration grounded on original Writ, may not be amended, if the Writ be erroneous."

"A New Law-Dictionary: Containing The Interpretation and Definition of Words and Terms used in the LAW, &c." By Giles Jacob, Gent., London, 1744.

> "*Amendment, Emendatio, The Correction of an Error committed in any Process,* which may be amended after Judgment; but if there be any Error in giving the Judgment, the Party is driven to his Writ of Error: Though where the Fault appears to be in the Clerk who writ the Record, it may be amended. *Terms de Ley* 39."

The Commentaries of Judge Blackstone was published in 1753, and was widely read in the American colonies. In the Virginia convention Mr. Madison said: "I will refer

you to a book which is in every man's hand,—'Blackstone's Commentaries.'" Through the writings of Blackstone the history of the common law and the legal terms employed in English jurisprudence were fully understood by lawyer and layman. The work was frequently referred to and quoted, both in the Federal and State Conventions. In Blackstone's time the Statutes of Amendment and Jeofail were so well known and their principle so well established in the law that he refers to it as "the general doctrine of amendment," and narrates in full its origin and history. Sharswood's Ed., Bk. 3, Chap. 25, p. 207.

Pleadings at common law were framed for the purpose of bringing the parties to an exact issue and the amendment of a process assisted in perfecting the issue and carrying out the purpose of the process. In its common law application, therefore, the word *amend* still maintained its derivative meaning, as it was directed to (1) an existing quality of error in the process; (2) the removal of that existing quality of error; and (3) the substitution therefor of a better quality. The process remained the same process. It was perfected only to carry out its purpose. Amendment prevented the purpose of the process from being defeated. More important still, the principle was never applicable beyond the purpose or jurisdiction of the process. Every process was limited by the extent of the authority which issued it. The cases therefore will be searched in vain for any precedents where a Court by amendment extended its own jurisdiction, or where a Court, acting within its jurisdiction, permitted an amendment beyond the recognized purpose of the process amended. As Mr. Chief Justice Taney said in *Ableman* v. *Booth, supra*:

> "No judicial process, whatever form it may assume can have any lawful authority outside of the limits of

the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

It can not be urged that the able lawyers, who were members of the Federal and State Conventions, were the only ones conversant with the legal meaning of *amendment,* as the English dictionaries published during the thirty years prior to the drafting of the Constitution, in every instance so far as consulted, give a clear definition of the word at common law. These publications, although printed abroad, had a considerable circulation in America. As these dictionaries may not be easily available, we quote from them in full.

(a) A New Complete English Dictionary, by D. BELLAMY, 1760.

AME'ND, (v.) to correct, to improve by art; to reform what is amiss; to behave better than heretofore.

AME'NDMENT, (s.) denotes an alteration in a thing for the better, a reformation of life, recovery of health. *In Law, the correction of an error in the process.*

(b) Dictionary of the English Language, by SAMUEL JOHNSON, A. M., London, 1760.

AME'ND, v.a. (*amender,* Fr.) (1) To correct, to change anything that is wrong; (2) To reform to life,—Jeremiah. (3) To restore passages in writers which the copiers are supposed to have depraved.

AME'ND, v.n. To grow better,—Sydney.

AME'NDMENT, s. (*amendement,* Fr.) (1) A change from bad for the better,—Ray. (2) Reformation of life,—Hooker. (3) Recovery of health,—Shakespeare.

(4) *In law, the correction of an error committed in a process.*

(c) An Universal Etymological English Dictionary, by N. Bailey, London, 1770.

Amend', (*amender,* F.; of *amendare,* L.) To reform; to correct; to repair; to make or grow better.

Amend'ment, (*amendement,* F.) Reformation; correction.

Amendment. *In law, the correction of an error committed and espied before judgment.*

(d) A New Dictionary of the English Language, by William Kendrick, LL.D., London, 1773.

Ame'nd, A-mend, v.a. (*amender,* Fr.; *emendo,* Lat.) to correct, to change anything that is wrong to something better; to reform to life or leave wickedness; to restore passages and writers which the copiers are supposed to have depraved; to recover the true meaning.

Ame'nd, v.n. to grow better. To amend differs from to improve; to improve supposes or not denies that the thing is well already, but to amend implies something wrong.

Amendment, A-mend-ment, n.s. (*amendement,* Fr.) A change from bad to better; reformation of life, recovery to health. *It signifies in law a correction of an error committed in a process and espied before or after judgment; and sometimes after the party's seeking advantage by the error.*

(e) A New and Complete Dictionary of the English Language, by John Ash, LL.D., London, 1775.

Ame'nd, (v.t. from the Lat. *amendo,* to mend) To correct; to restore.

Ame'nd, (v. int.) To grow better.

AMEN'DMENT, (s. from amend) A change for the better; a reformation; a recovery; *in law, the correction of an error in a process.*

(f) The Royal English Dictionary, by D. FENNING, London, 1775.

AME'ND, v. (*amender,* Fr. *amendo,* Lat.) To alter something faulty for the better; applied to writings, to correct; to reform applied to manners or behavior. "Amend your ways and your doings." Jerem. xxvi, 13. To grow from a more infirm state to a better; to recover.

AME'NDMENT, s. (*amendement,* Fr.) An alteration which makes it better; a correction, a change from vice to virtue; it signifies a change from sickness towards health; a recovery.

AME'NDMENT, s. (*amendatio,* Lat.) *In law, a correction of an error committed in a process.*

(g) An Universal Etymological English Dictionary, by N. BAILEY, London, 1780.

AMEND', (*amender,* F.; of *amendare,* L.) To reform; to correct; to repair; to make or grow better.

AMEND'MENT, (*amendement,* F.) Reformation; correction.

AMENDMENT. *In law, the correction of an error committed in a process observed before judgment which also may be amended by the Justices after judgment.*

(h) A General Dictionary of the English Language, by THOMAS SHERIDAN, A.M., London, 1780.

AMEND, A-MEND', v.a. To correct, to change anything that is wrong, to reform the life, to restore passages, etc.

AMEND, A-MEND', v.n. To grow better.

AMENDMENT, A-MEND'MENT, s. To change from bad

for the better, reformation of life, recovery of health; *in law, the correction of an error committed in a process.*

(i) A Complete and Universal English Dictionary, by JAMES BARCLAY, 1782.

AME'ND, v.a. (*amender,* Fr.) To alter something faulty for the better, applied to writings to correct; to reform applied to manners or behaviour; to grow from a more infirm state to a better; to recover.

AME'NDMENT, s. (*amendement,* Fr.) An alteration which makes it better; a correction, a change from vice to virtue; it signifies a change from sickness towards health; to recover; *in law, the correction of an error committed in a process.*

(j) A Complete Dictionary of the English Language, by THOMAS SHERIDAN, 3d. ed., London, 1790, 2v. Same definitions as in the London edition of 1780. (*infra.*)

(k) A Complete Dictionary of the English Language, by THOMAS SHERIDAN, 4th ed., Dublin, 1790, 906 p. Same definitions as in the London edition of 1780. (*infra.*)

(l) A Critical Pronouncing Dictionary and Expositor of the English Language, by JOHN WALKER, London, 1791.

TO AMEND, v.a. To correct, to change any thing that is wrong; to reform the life; to restore passages in writers which the copiers are supposed to have depraved.

TO AMEND, v.n. To grow better.

AMENDMENT, s. A change from bad for the better; reformation of life; recovery of health; *in law, the correction of an error committed in a process.*

There was no English dictionary printed in America prior to the drafting of the Federal Constitution. The first

from an American press was "The Royal Standard English Dictionary: the First American Edition, carefully revised and corrected from the Fourth British Edition, by William Perry, Lecturer, in the Academy at Edinburgh." This was printed at Worcester, Mass., in 1788.

In erecting a super-government over existing State governments the framers of the Constitution initiated a novel political experiment. There was no precedent in all history to guide them in its construction. A new sovereignty was to be created over the same people and over the same territory where existing sovereignties already held sway. The super-government necessarily must be limited to keep it within its own field of operation to prevent conflict and discord. It must necessarily be limited both as to its purposes and as to its powers. The nearest analogies in law to such a delegation of limited authority were restricted grants and powers of attorney. And as the powers were to be granted or delegated by the sovereign people the instrument of the grant or delegation of authority was in its nature a great process under the teste of the people of the United States. The instrument was repeatedly referred to as a great warrant, or charter, or commission of authority. Mr. Iredell in the North Carolina Convention well expressed this view:

> "It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as *a great power of attorney,* under which no power can be exercised but what is expressly given. Did any man ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him?" El. Deb., Vol. 4, p. 148.
>
> The Constitution thus being viewed as a great legal

process, warrant or commission, the principle of amendment which had been applied for centuries to judicial processes and legal documents became directly applicable. And as amendment was always limited to the jurisdiction of the process, or to the purpose of the pleading, or to the scope of the legal document, the term was especially appropriate in relation to a written Constitution designedly limited in all these respects.

(D) Mr. Madison's Interpretation.

As the selection of the word *amendment* in Article V was due to Mr. Madison, it is in point to ascertain the particular significance he gave to the word. In the Federal Convention on August 13th, upon motion of Mr. Randolph, the following proposition (Art. 1, Sec. 7) was before the House:

> "Bills for raising money for the purpose of revenue or for appropriating the same shall originate in the House of Representatives and shall not be so *amended or altered* by the Senate as to increase or diminish the sum to be raised or change the mode of levying it or the object of its appropriation." *Farrand,* Vol. 2, p. 273.

In speaking to this proposition Mr. Madison thus criticised its phraseology:

> "The words 'amend or alter,' form an equal source of doubt and altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Representatives it will be called *an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the degree of connection between the matter and object of the bill and the amendment offered to it.* Can there be a more fruitful

source of dispute, or a kind of dispute more difficult to be settled?" *Farrand,* Vol. 2, p. 276.

It is clear from this statement that Mr. Madison's conception was that an amendment did not include an origination, and did not embrace extraneous matter, but necessitated some connection or relation between an amendment and the thing amended. Mr. Chief Justice Taney in the *Passenger Cases,* 7 How. 283, 477 (1849), said: "The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense."

The same section of the Constitution was under consideration in the case of *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 142 (1911). It was there contended that an act was unconstitutional because it was a revenue measure and originated in the Senate in violation of Section 7, of Article 1, of the Constitution, providing that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with *amendments* as on other bills." Mr. Justice Day, speaking for the Court, said:

> "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. *The amendment was germane to the subject matter of the bill,* and not beyond the power of the Senate to propose."

(E) Contemporaneous Interpretation.

Great weight has always been attached to contemporaneous exposition. The provision in Article V of the Constitution for the amendment of the instrument did not provoke much discussion in the several State Conventions which ratified the Constitution. The authors of *The Federalist* devoted very little attention to the subject. There seems to have been a general acquiescence in the propriety of the provision.

In 1787 parliamentary procedure was more exact and logical than it is today. An amendment was then a matter of substance, entirely a matter of substance. The mere form of introducing a proposition which was new or which was unrelated and extraneous to the matter under discussion was never called an amendment. If new matter was desired to be introduced, the procedure was to move to postpone the consideration of the proposition then before the House and after that was adopted to bring forward the new proposition. Numerous instances of this procedure may be found in the Records of the Federal Convention. A rule adopted by the First Congress at its first session clearly states the accepted parliamentary practice of that period. The one referred to provides that

> "No new motion or proposition shall be admitted, under color of amendment, as a substitute for the motion or proposition under debate." Gales & Seaton's Debates, Vol. 1, p. 104.

The following extracts from the debates in the State Conventions illustrate the use of the word *amendment* at that time. They also prove that it was the general understanding that an *amendment* was the correction of errors committed in drafting the Constitution; that such errors were expected to develop in the operation of the government

and that from experience alone they could be determined and best corrected. Elliot's Debates.

Mr. Iredell, (N. C.): "The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no *error in what they did.* The gentlemen who framed this Constitution thought with much more diffidence of their capacities; and, undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. * * * It is a most happy circumstance, that there is a remedy in the system itself for *its own fallibility,* so that alterations can without difficulty be made, agreeable to the general sense of the public." Vol. 4, p. 176.

Gov. Bowdoin, (Mass.): "Like all other human productions, *it may be imperfect;* but most of the imperfections imputed to it are ideal and unfounded, and the rest are of such a nature that they cannot be certainly known but by the operation of the Constitution; and if, *in its operation,* it should in any respect be essentially bad, it will be amended in one of the modes prescribed by it." Vol. 2, pp. 83, 84.

Mr. Ames, (Mass.): "This Constitution may be good without any amendments, and yet the amendments may be good; for they are not *repugnant* to the Constitution." Vol. 2, p. 155.

Mr. Thatcher, (Mass.): "After all, I by no means pretend that there is complete perfection in this proposed Constitution. Like all other human productions, *it hath its faults.* Provision is made for an amendment, whenever, *from practice,* it is found oppressive." Vol. 2, p. 146.

Mr. Lee, (Va.): "To fortify this security, is there not a constitutional remedy in the government, to reform *any errors* which shall be found inconvenient?" Vol. 3, p. 186.

Mr. Taylor, (N. C.): "Mr. Joseph Taylor thought it improper to object to every trivial case; that this clause had been argued on in some degree before; and that it would be a useless waste of time to dwell any longer on it; that if they had the power of amending the Constitution, every part need not be discussed, as some were not objectionable; and that, for his own part, he would object when any *essential* defect came before the house." Vol. 4, p. 104.

Mr. Jarvis, (Mass.): "Mr. President, I cannot suffer the present article to be passed, without rising to express my entire and perfect approbation of it. Whatever may have been my private opinion of any other part, or whatever *faults or imperfections* I have remarked, or fancied I have seen, in any other instance, here, sir, I have found complete satisfaction; this has been a resting place, on which I have reposed myself in the fullest security, whenever a doubt has occurred, in considering any other passage in the proposed Constitution." Vol. 2, p. 116.

Mr. Iredell, (N. C.): "Should the *government on trial* be found to want amendments, those amendments can be made in a regular method, in a mode prescribed by the Constitution itself." Vol. 4, p. 130.

Mr. Wilson, (Pa.): "This Constitution may be found to have *defects in it;* hence amendments may become necessary." Vol. 2, p. 498.

Mr. King, (Mass.): "He believed gentlemen had not, in their objections to the Constitution, recollected

> that this article was a part of it; for many of the arguments of gentlemen were founded on the idea of future amendments being impracticable. The honorable gentleman observed on the superior excellence of the proposed Constitution in this particular, and called upon gentlemen to produce an instance, in any other national constitution, where the people had so fair an opportunity *to correct any abuse which might take place in the future administration of the government under it.*" Vol. 2, p. 116.

In several of the State conventions the point was raised that the Philadelphia Convention had exceeded its authority in proposing the new Constitution; that the members of that Convention were commissioned by the States to *amend* the Articles of Confederation; and that instead of *amending* those Articles they had drafted an instrument *entirely new and different*. It was generally recognized that the framers of the Constitution did exceed their authority, for their credentials did not empower them to destroy the existing government under the Articles of Confederation and create an entirely new and different Constitution. In Virginia Mr. Thompson said: "The Convention were sent on to Philadelphia to *amend* this Confederation; but they made a *new* creature." Vol. 3, p. 61. And Mr. Grayson, making the same distinction, remarked: "The late Convention were not empowered totally *to alter* the present Confederation. The idea was *to amend*. If they lay before us a thing quite different, we are not bound to accept it." Vol. 3, p. 614.

(F) Interpretation from Context.

By giving to the word *amendment* its common law meaning, Article V expresses a plain, simple, unequivocal intent to provide for the correction of errors committed in framing the Constitution. Such a provision would be a natural precaution against unintentional errors and against defects that might develop in the course of its operation. If this were in reality the purpose, it could not have been more accurately and exactly expressed. This purpose comports with a consistent and harmonious construction of the instrument as a whole. On the other hand, if some vague and corrupt meaning be given to *amendment,* or if the word in Article V is eliminated as it practically is by defendants' doctrine, then the most serious inconsistencies and consequences ensue. The object of all interpretation and construction is to determine the intent of the framers of the Constitution. Where the legal significance of a word may be gathered from its usage and application at the common law and where that meaning in connection with the context expresses a plain and simple intent, there must be some strong reason advanced for not accepting an interpretation so apparent on the face of the instrument. In this connection Judge Cooley quotes the following with approval:

> "Whether we are considering an agreement between parties, a statute, or a constitution with a view to its interpretation, the thing which we are to seek is *the thought which it expresses.* To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. *If thus regarded, the words embody a definite meaning, which involve no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is*

the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning." Cons. Lim., 7th Ed., p. 91.

(a) "This Constitution."

While the interpretation of the word may leave no room for construction, still construction may be resorted to for the purpose of confirming the result of interpretation alone. By Article V Congress is only authorized to propose "amendments to *this* Constitution." What is *this* Constitution? It is not a code; it is not a body of transient laws. The framers of the instrument fully understood that they were establishing political principles that were fundamental and upon which the governmental structure was to be erected. Mr. Hamilton said in the New York Convention: "Constitutions should consist only of general provisions: the reason is, that they must necessarily be permanent, and that they cannot calculate for the possible change of things." El Deb., Vol. 2, p. 364. In North Carolina Mr. Johnson inquired: "Are laws as immutable as Constitutions? Can anything be more absurd than assimilating the one to the other? The idea is not warranted by the Constitution, nor consistent with reason." El. Deb., Vol. 4, p. 188. In the same State Mr. Iredell remarked: "Gentlemen will be pleased to consider that there is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing which ought not to

be done often. When regulated by law, it can easily be occasionally altered so as best to suit the conveniences of the people." El. Deb., Vol. 4, p. 144. That the Constitution deals only with the structure of government, the delegation of powers and the distribution of them, was stated by Mr. Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch, 137 (1803):

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.
>
> "This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
>
> "The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

In *Van Horn* v. *Dorrance,* 2 Dall. 304, 308 (1795), Mr. Justice Patterson expressed the same view:

> "What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land."

A Constitution is variously defined by text writers, but they all agreed as to its fundamental nature. The follow-

ing distinction between fundamental principles and ordinary laws may be quoted from Jameson's Constitutional Conventions, 4th Ed., Sec. 85:

> "Before proceeding to the task indicated, however, it may be useful to ascertain with precision the distinction between a *constitution* or *fundamental ordinance,* and an *ordinary municipal law.* Both must be denominated laws, since they are equally 'rules of action laid down or prescribed by a superior.' *Ordinary laws are enactments and rules for the government of civil conduct,* promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. *Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation,* and the apparatus of checks and balances proper to insure its integrity and continued existence. *Fundamental laws are primary,* being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. *Ordinary laws are secondary,* having reference to the exigencies of time and place resulting from the ordinary working of the machine. *Fundamental laws precede ordinary laws in point of time,* and embrace the settled policy of the state. Ordinary laws, are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and express, as we have said, the expedient, or the right viewed as the expedient, under the varying circumstances of time and place."

In *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 227 (1916), Mr. Justice Pitney observed:

> "At this late day it ought not to be necessary to repeat that the object of the framers of that instrument

> was to lay the foundation of a government, to set up its framework and to establish merely the general principles by which it was to be animated."

This Constitution therefore is a framework of government and the embodiment of the fundamental principles upon which it is established. It is to this Constitution that Congress is authorized to make proposals of amendment. The proposals may not be other than amendments, and the character of them should be harmonious with the Constitution itself. By an amendment the identity or purpose of the instrument is not designed to be changed, but only a defective quality in it that has become apparent by the operation of government under it. The Constitution must still be *this* Constitution after it is amended. The words "this Constitution" were substituted for "Articles of Union" in the Federal Convention. This substitution did not change the intent. This Constitution is still the Articles of Union and it is *this* Constitution in its several articles that is amendable. Furthermore, it is a limited Constitution and must remain a limited Constitution after amendment. It would be the greatest absurdity to contend that there was a purpose to create a limited government and at the same time to confer upon that government a power to do away with its own limitations. It is only under *this* Constitution that the amending function may be exercised, and when the limitations of this Constitution are overridden, even the authority to amend ceases, for *this* Constitution would then no longer exist.

In *Marbury* v. *Madison, supra,* Mr. Chief Justice Marshall emphasizes the importance and the permanency of constitutional limitations.

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these

limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. * * *

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

(b) "Deem it Necessary."

Article V provides that "Congress, whenever two-thirds of both Houses shall deem it *necessary,* shall propose Amendments to this Constitution." Reference has already been made to the Pennsylvania Constitution of 1776 and the Massachusetts Constitution of 1780. The corresponding phrase in the former reads, "as there appear an absolute necessity of amending any article of the Constitution," and in the latter, "such alterations as from experience shall be found necessary." The word "necessary" in Article V was evidently taken from these prior examples of its use in the amendatory provisions of the Pennsylvania and Massachusetts Constitutions. The word must be given some significance in Article V. The doctrine of the defendants, however, gives no more effect to it than to the word *amendment.*

The defendants claim that Congress at any time has the power to propose any proposition as an Amendment, and that the enactment of the proposal constitutes a determination of the necessity of it. Thus a wide door is opened to speculation upon new theories of government, and the amending function is converted into a means of trying out such theories in the form of constitutional experimentations.

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland, supra,* discussed at length the meaning of the word "necessary" in Art. 1, Sec. 8, Par. 19. He remarked with reference to it: "This word then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." He concluded the argument on this point with the statement of that rule so frequently cited: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." While it is not the purpose of this brief to urge any test of constitutionality in this cause, no better one suggests itself as to the measure of a valid amendment. Let the end be legitimate, let it be within the scope of the Constitution, and all proposals of Amendment which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are valid.

The word "necessary" in Article V implies that an amendment is not a matter of speculation. In the First Congress it was suggested that a vote upon the necessity of an amendment should precede the vote upon the proposal itself. The suggestion was not followed, but, nevertheless. it reflected the importance attached to the word at that time.

Many of the members of the First Congress had participated either in the Federal or State Conventions. Their debates upon the submission of the first ten Amendments clearly show that they understood an amendment to be the correction of a defect in the Constitution which should disclose itself in the operation of the government, and that the necessity for amendment could only be determined by experience. The following remarks are taken from these debates. Gales & Seaton's Debates, Vol. 1:

> MR. WHITE: "I think a majority of the people who have ratified the constitution, did it under the expectation that Congress would, at some convenient time, examine its texture and point out where *it was defective,* in order that it might be judiciously amended. Whether, while we are without *experience,* amendments can be digested in such a manner as to give satisfaction to a constitutional majority of this House, I will not pretend to say." p. 445.

> MR. SHERMAN: "For my part, *I question if any alteration which can be now proposed would be an amendment, in the true sense of the word;* but nevertheless, I am willing to let the subject be introduced. * * * The provision for amendments made in the fifth article of the constitution, was intended to facilitate the adoption of those which *experience should point out to be necessary."* pp. 445, 686.

> MR. JACKSON: "When the propriety of making amendments shall be obvious from *experience,* I trust there will be virtue enough in my country to make them. * * * Let the constitution have a fair trial; let it be examined by *experience,* discover by that test *what its errors are,* and then talk of amending; but to attempt it now is doing it at a risk, which is certainly imprudent. * * *

"Why will gentlemen press us to propose amendments, while we are without *experience?* * * * The *imperfections* of the Government are now unknown; let it have a fair trial, and I will be bound they show themselves; then we can tell where to apply the remedy, so as to secure the great object we are aiming at." pp. 442, 443, 461.

MR. AMES: "Mr. Ames begged to know the reasons upon which amendments were founded. He hoped it was not purely to gratify an indigested opinion; but in every part where they *retouch the edifice* it was with an intention of improving the structure; they certainly could not think of making alterations for the worse." p. 751.

MR. VINING: "Though the State I represent had the honor of taking the lead in the adoption of this constitution, and did it by a unanimous vote; and although I have the strongest predilection for the present form of Government, yet I am open to information, and willing to be convinced of *its imperfections.* If this be done, I shall cheerfully assist in correcting them. But I cannot think this a proper time to enter upon the subject; * * * for want of e*xperience,* we are as likely to do injury by our prescriptions as good." p. 448.

MR. JACKSON: "I am of opinion we ought not to be in a hurry with respect to altering the constitution. For my part, *I have no idea of speculating in this serious manner on theory. If I agree to alterations in the mode of administering this Government, I shall like to stand on the sure ground of experience, and not be treading air. What experience have we had of the good or bad qualities of this constitution? Can any gentleman affirm to me one proposition that is a certain and absolute amendment? I deny that he can.* Our constitution, sir, is like a vessel just launched, and lying at the wharf;

she is untried, you can hardly discover any one of her properties. It is not known how she will answer her helm, or lay her course; whether she will bear with safety the precious freight to be deposited in her hold. But, in this state, will the prudent merchant attempt alterations? Will he employ workmen to tear off the planking and take asunder the frame? He certainly will not. Let us, gentlemen, fit out our vessel, set up her masts, and expand her sails, and be guided by the experiment in our alterations. If she sails upon an uneven keel, let us right her by adding weight where it is wanting. In this way, we may remedy her *defects* to the satisfaction of all concerned; but if we proceed now to make alterations, we may deface a beauty, or deform a well proportioned piece of workmanship." pp. 441, 442.

In the present cause, the defects which the so-called Eighteenth Amendment are designed to cure are not defects in the operation of the Federal Government, for the Federal Government is entirely without power over the subject matter of the so-called Amendment and has never operated in respect to the subject matter. Neither has Congress had any experience whatever, either in exercising the power of police or in dealing with the subject matter within the territorial limits of the States. Congress, therefore, cannot constitutionally "deem it necessary" to propose an amendment to this Constitution so utterly unrelated to the operation of the Federal Government thereunder. Necessity for amendment can only arise in consequence of defects in the operation of government under the Constitution. There can be no necessity beyond the scope of the Constitution.

(9) Prior Amendments.

An examination of the prior amendments to the Constitution will disclose that all of them have been declaratory and interpretative or have had reference to a power or to a subject matter dealt with in the instrument itself. They have all been within the scope of the Constitution. The first eleven declared the meaning of the original document as it was understood by those who framed and ratified it; the twelfth related to a specific article dealing with the election of the Executive; the thirteenth, fourteenth and fifteenth broadly concerned a great constitutional compromise which appears in several articles; they constituted a new Magna Charta and recorded the inexorable decree of civil war; the sixteenth modified the application of the taxing power, and the seventeenth changed the method of electing Senators. They were all proposed and ratified as corrections of errors that developed in the course of the actual operation of the Federal Government.

(A) First Ten Amendments.

The first ten amendments were proposed by the First Congress, on September 25, 1789. They had their origin in the purpose to fix definite limitations upon the general government. This purpose was to prevent encroachments upon the powers of the States. In the discussion upon the adoption of the Constitution, the Federalists had claimed that the general government was definitely limited by the terms of the Constitution and that all powers not expressly delegated therein were reserved to the respective States. The Anti-Federalists were in doubt and contended that if these limita-

tions were intended the Constitution should plainly state that intent. In so far, therefore, as the Constitution failed to set forth the exact limitations which were intended by all parties, these Amendments may be said to be a correction of an error in the process. The Constitution was not changed in any respect by their adoption. They neither increased nor diminished any power. They have always been construed as limitations upon the powers of the Federal Government, but they imposed no further limitations than those intended by a correct construction of the original document. These Amendments are regarded as a contemporaneous exposition of the original instrument and a part of it.

Barron v. *Baltimore,* 7 Pet. 243 (1833).

Spies v. *Illinois,* 123 U. S. 131 (1887).

Davis v. *Texas,* 139 U. S. 651 (1890).

O'Neil v. *Vermont,* 144 U. S. 323 (1891).

Miller v. *Texas,* 153 U. S. 535 (1893).

Brown v. *New Jersey,* 175 U. S. 172 (1899).

Capital City Dairy Co. v. *Ohio,* 183 U. S. 238 (1901).

(B) Eleventh Amendment.

The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This Amendment was due to a construction of the Constitution other than had been intended by its framers. Art. 3, Sec. 2, provides that the judicial power shall extend to controversies "between a State and citizens of another State." In the case of *Chis-*

holm v. *Georgia,* 2 Dall. 419 (1793), that clause was construed to include suits by a citizen of one State against another State. It was the general understanding at the time of the adoption of the Constitution, however, that that clause was restricted to suits by a State against citizens of another State. In so far, therefore, as the Constitution failed to express accurately the intent and purpose of those who framed and adopted it, this Amendment likewise was the correction of an error in the process.

Chief Justice Marshall, in *Cohens* v. *Virginia,* 6 Wheat. 264 (1821), said in reference to this Amendment:

> "It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures."

Mr. Justice Campbell in *Florida v. Georgia,* 17 How. 478 (1854), fully explains the corrective purpose of this Amendment:

> "While the constitution was under discussion, General Hamilton (Federalist, 81) said, 'that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent,' and contended 'that to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the state governments, a power which would involve such consequences, would be altogether forced and unwarrantable.' So, Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Vir-

ginia convention by assuring it that 'it is not in the power of individuals to call any State into court. The only operation the clause can have is, that if a State should wish to bring a suit against a citizen, it must be brought in a federal court.' And the late Chief Justice Marshall supported him, saying: 'With respect to disputes between a State and citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a federal court. It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words.' Virginia Deb., 387, 405, 406.

"When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the States, by individual plaintiffs, shortly after the adoption of the constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequenecs to the States as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation."

(C) Twelfth Amendment.

The original Constitution, in Art. 2, Sec. 3, directed in detail the manner in which the President of the United States should be elected. The historic contest between Mr. Jefferson and Mr. Burr for that office in 1800-1801, disclosed a defect in the operation of the electoral system. This defect was remedied by the Twelfth Amendment. This Amendment, therefore, like those that preceded

it, was the correction of an error committed in the process. Through actual experience in the operation of the government one of the structural provisions of the Constitution had been proven defective. There was no diminution or enlargement of powers to Nation or State. The Amendment was purely corrective.

(D) Thirteenth Amendment.

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the parties shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction." The Civil War terminated slavery and all incidents of slavery. It gave to the colored man the status of a freeman and placed him upon an equality with others under the law. Force alone brought about these results. The Civil War amendments simply recorded these results and secured to the colored man those rights that are inseparable from the status of freemen,—the rights of equality under the law. Equality under the law is a principle of republicanism. These three Amendments must be considered together and interpreted from an historical point of view. In speaking of them, Mr. Justice Miller in the *Slaughter-House Cases*, 83 U. S. 36 (1872), said:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and

> the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." * * * "Fairly construed, these Amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the Nation. Before the war it could have been done only by the States where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject except in the Territories."

Slavery had been dealt with in the orginal Constitution. Art. 1, Sec. 2, Par. 3; Art. 1, Sec. 9, Par. 1; Art. 4, Sec. 2; Art. 5. In 1772 it had been declared contrary to the laws of England by Lord Mansfield, in *Somerset* v. *Stewart,* 20 State Trials, 1, 82; and in 1781 it had been declared contrary to the Massachusetts Declaration of Rights by a Massachusetts Court. It was one of the compromises of the Constitution and so understood in the Federal and State Conventions. In the Massachusetts Convention, Mr. Thompson inquired: "Mr. President, shall it be said that after we have established our own independence and freedom, we make slaves of others?" El. Deb., Vol. 2, p. 107. In the same Convention Mr. Heath said:

> "If we ratify the Constitution, shall we do anything by our act to hold the blacks in slavery? or shall we become the partakers of other men's sins? I think, neither of them. Each state is sovereign and independent to a certain degree, and the states have a right, and they will regulate their own internal affairs as to them-

selves appears proper; and shall we refuse to eat, or to drink, or to be united, with those who do not think, or act, just as we do? Surely not. We are not, in this case, partakers of other men's sins; for in nothing do we voluntarily encourage the slavery of our fellowmen. A restriction is laid on the federal government, which could not be avoided, and a union take place. The federal Convention went as far as they could." El. Deb., Vol. 2, p. 115.

Mr. Iredell, in North Carolina, remarked in reference to the same subject:

"For my part, were it practicable to put an end to the importation of slaves immediately, it would give me the greatest pleasure; for it certainly is a trade utterly inconsistent with the rights of humanity, and under which great cruelties have been exercised. When the entire abolition of slavery takes place, it will be an event which must be pleasing to every generous mind, and every friend of human nature; but we often wish for things which are not attainable." El. Deb., Vol. 4, p. 100.

The subject of slavery was compromised not only at the time of the framing of the Constitution, but continued to be compromised in Congress for half a century. It occasioned continuous political strife, threatened the existence of the Union, and furnished the underlying cause of the Civil War. At the conclusion of that War the complete elimination of the cause of so much evil was necessary to the existence of the Nation. As the Constitution breathes the spirit of the freedom and equality of the Declaration of Independence, the fact that the subject of slavery was compromised in the Federal Convention of 1787 must now be regarded as an error. It was so recognized, even at the time, but circumstances made that error unavoidable. That error committed in the process was cured by force of arms.

Thereafter the result of military force was recorded through these Amendments. These Amendments would probably never have been adopted by the Legislatures of three-fourths of the several States had not the political power of Congress, backed up by the full military strength of the Nation, compelled their ratification. It is a matter of history that the Federal Government declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection until they ratified those articles by a formal vote of their legislative bodies. It was therefore force, and force alone, that placed these Amendments in the Federal Constitution, and the law of self-preservation was the justification of the course pursued.

(E) Fourteenth Amendment.

(1) "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." With reference to this clause of the Fourteenth Amendment, Mr. Justice Miller in the *Slaughter-House Cases, supra,* said:

> "The 1st section of the 14th article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union.

Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country had never been overruled; and, if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

"To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a State, the 1st clause of the 1st section was framed."

(2) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Mr. Justice Washington, in *Corfield* v. *Coryell,* 4 Wash. C. C. 380, defined the privileges and immunities of citizens of the United States.

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general

heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the citizens of the other State,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities; and the enjoyment of them by the citizens of each State in every other State was manifestly calculated 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.' "

In the *Slaughter-House Cases, supra,* Mr. Justice Swayne said in reference to this clause:

"A citizen of a State is *ipso facto* a citizen of the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. 'The privileges and immunities' of a citizen of the United States include, among other things, the fundamental rights of life, liberty and property, and also the rights which pertain to him by reason of his

membership of the Nation. The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection."

(3) "Nor shall any State deprive any person of life, liberty or property, without due process of law." Explaining this clause in the *Slaughter-House Cases, supra,* Mr. Justice Swayne said:

"Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. 'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure. The 'equal protection of the laws' places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness. *Corfield* v. *Coryell,* 4 Wash. C. C., 380; *Lemmon* v. *People,* 26 Barb., 274, and 20 N. Y., 626; *Conner* v. *Elliott,* 18 How., 593; *Murray* v. *McCarty,* 2 Munf. 399; *Campbell* v. *Morris,* 3 Har. & McH. 554; *Towles'* case,

5 Leigh, 748; *State* v. *Medbury,* 3 R. I., 142; 1 Tucker, Bl., 145; 1 Cooley, Bl., 125, 128." * * *

In *United States* v. *Cruikshank,* 92 U. S. 542 (1875), Mr. Justice Waite said on the same subject:

> "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank* v. *Okely,* 4 Wheat. 244, it secures 'The individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

(4) "Nor deny to any person within its jurisdiction the equal protection of the laws." With reference to this clause, Mr. Justice Waite in *United States* v. *Cruikshank, supra,* remarked:

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

(F) Fifteenth Amendment.

"The right of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." Mr. Justice Washington in *Corfield* v. *Coryell, supra,* held that the elective franchise, as regulated and established by the laws or constitution of a State in which it is to be exercised, was one of the privileges of citizens of all free governments. The Federal Constitution, however, does not confer the right of suffrage; it accepts the electors as qualified in the several States as its own electors. The Fifteenth Amendment does not confer any right of suffrage, but simply imposes an inhibition that was consistent with free government and personal equality under the law,—an inhibition against unjust and unreasonable discrimination in the matter of suffrage.

In *United States* v. *Cruikshank, supra,* Mr. Justice Waite clearly explained the scope of this Amendment:

> "In *Minor* v. *Happersett,* 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *U. S.* v. *Reese,* just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United

States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The Civil War abolished slavery and all the incidents of slavery. It did not change the fundamental relation between State and Nation. The balance between State and Federal powers was not disturbed by the Thirteenth, Fourteenth and Fifteenth Amendments. The sovereign powers of a State were still reserved and possessed as original and inherent. And the sovereign powers of the Nation were still subject to constitutional limitations.

Mr. Justice Field, in *Bartemeyer* v. *Iowa,* 18 Wall. 129, 138 (1874):

"No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that Amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose."

Mr. Justice Field, in *Barbier* v. *Connolly,* 113 U. S. 27, 31 (1885):

"But neither the Amendment,—broad and comprehensive as it is,—nor any other Amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Mr. Chief Justice Fuller, in *In re Rahrer,* 140 U. S. 545, 554 (1891):

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *
>
> "The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

Mr. Justice Miller, in the *Slaughter-House Cases,* 83 U. S. 36 (1872):

> "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that *this court, so far as its function required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.*"

(G) Sixteenth Amendment.

By Art. 1, Sec. 8, Congress has power to lay and collect taxes. In Art. 1, Sec. 9, however, it was provided that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." The Sixteenth Amendment related to a power delegated to Congress by the Constitution. It neither increased nor diminished that power. It simply provided for a more just and equitable exercise of that power. In so far as this Amendment was designed to permit a better method in the exercise of a delegated power, it may be said to be the correction of an error committed in the process. The Amendment was not an infringement upon the powers of the States.

(H) Seventeenth Amendment.

This Amendment relating to the election of United States senators by the people, was in lieu of Par. 1, of Sec. 3, of Art. 1, and in lieu of so much of Par. 2 of the same section as related to the filling of vacancies. It has direct references to articles and sections in the Constitution. It strictly concerns no substantive power of either Nation or State. Its theory is to substitute a better method in the election of United States senators. So far as this change was regarded as an improvement in the selection of senators to represent a State, it may be said that the Amendment was the correction of an error committed in the process.

(10) The Amending Function is Purely Federal.

The Constitution was established by the people of the United States for their own government, and not for the government of the individual States. The powers the people of the United States conferred on this government were to be exercised by the government itself. All the instrumentalities for exercising powers conferred are federal. The power to amend the Constitution is a federal function. It relates to the Constitution which was established by the people of the United States for their own government. The power to amend the Constitution was provided by the people of the United States as a means of correcting errors committed in the establishment of their own government.

Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), said:

> "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

That the execution of any power or the carrying out of any function under one sovereign government should be dependent in any way upon the will or discretion of another sovereign government, or that one sovereign government under the guise of an amendatory provision can invade and intermeddle with the powers and jurisdiction of another

sovereign government is so inconsistent with all conceptions of sovereignty and the attributes of sovereignty that the mere statement of either proposition should be a sufficient refutation of it. In *Barron* v. *The Mayor and City Council of Baltimore,* 7 Pet. 243 (1833), Mr. Chief Justice Marshall observed:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself."

Congress in proposing, and the Legislatures in ratifying an amendment to the Constitution, are federal representatives. They derive all their power and authority from the Constitution. They derive no power from the laws or constitutions of the several States. Congress and the Legislatures of the several States were made an amending branch of the Federal Government for the purposes expressed in Article V, and like other branches of the Federal Government, must find their powers within the Constitution. They act as the representatives of the people of the United States. They cannot exceed the powers of their principal, the people of the United States. The Constitution is the measure of these powers, as no portion of sovereignty resides in government.

The State is not a party to the amendment of the United States Constitution. The sovereign people of a State do

not participate. The State, as a body politic, takes no part. "A State, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." *Texas* v. *White, supra.* The Legislature of a State, in ratifying an amendment, does not act for the State, and cannot relinquish the sovereign powers of the State. The Legislature is a creature and not the creator of a State constitution. The members of a State Legislature have official powers, but they do not participate in sovereignty in any other capacity than as citizens, like other citizens of the State. A State is bound in respect to its sovereign powers only by an explicit act of the whole people. If the sovereign powers of a State reside in the people of the State, so the discretion in the exercise of those powers resides in the people. Congress may not constitutionally propose, therefore, nor may the Legislature of a State constitutionally ratify any proposition as an amendment that involves the exercise or the relinquishment of the sovereign powers of a State. The people of a State alone are competent to an expression of sovereign will.

In case of a valid amendment the consent of the people of the United States is implied from the original delegation of powers in the Federal Constitution and as an incident to them. A valid amendment requires no expression of the sovereign will of the people of the United States. To be valid, an amendment must have such relation to the original grant of powers and to the scope and purposes of the Constitution as will carry an implication of assent on the part of the people of the United States. The proposal of the so-called Amendment in the present case has no relation to any of the expressed or implied powers in the Constitution, and

its subject matter is entirely without the jurisdiction and powers of the people of the United States. The implication of assent on the part of the people of the United States cannot arise when the power involved and the subject matter dealt with are entirely beyond their sphere of action.

In discussing the provisions of Article V of the Constitution, the Supreme Court of Maine, in delivering an advisory opinion on the question of a referendum upon the so-called Amendment, said:

> "All the federal amendments which have thus far been adopted have been proposed in compliance with the first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth* v. *Virginia,* 3 Dall. 378; *State* v. *Dahl,* 6 N. D. 81. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the *people of the United States* under the power expressly conferred by Article V, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention.
>
> "As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

"First, by the Legislatures of three-fourths of the several States; or,

"Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

"Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

"Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people (of the United States)* as a ratifying body, under the power expressly conferred upon it by Article V. The people (of the United States)* through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They (the people of the United States)* retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly. * * *

"It admits of no doubt that the matter of amendment which is governed by Article V, the people (of the United States)* divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislatures or upon state constitutional conventions." *In re Opinion of Justices*, 107 Atl. Rep. 673 (1919).

---

* Parentheses ours.

In *Dodge* v. *Woolsey,* 19 How. 348 (1856), Mr. Justice Wayne, in emphasizing the supremacy of the Constitution, said:

> "It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they (the people of the United States)* have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them (the people of the United States)* by the Congress of the United States, when two-thirds of both houses shall propose them, or when the Legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the Legislatures of three-fourths of them, as proposed by Congress. * * * Now, whether such a supremacy of the Constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people (of the United States)* upon themselves, and for themselves, as to the modes of amendment, be right or wrong politically, no one can deny that the Constitution is supreme, as has been stated, and that the statement is in exact conformity with it."

A well known writer on Constitutional Law, after tracing the history and the scope of Article V, concludes as follows:

> "Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people (of the United States)* either in Legislature or in convention, and not by the people (of the United States)* voting on it directly. The people (of the United States)* have no direct power either to propose an amendment or to ratify it after it is proposed and submitted." Watson, Const., Vol. 2, p. 1310.

---

* Parentheses ours.

(11) The Proposal of the So-called Eighteenth Amendment Was Unconstitutional.

The practice of Congress in proposing Amendments has been uniform since the Constitution was adopted and clearly indicates that Congress in proposing and the Legislatures in ratifying an Amendment are federal representatives designated for the performance of a federal function. Heretofore, in every instance Congress has proposed Amendments *to the Legislatures* of the several States. In the case of the so-called Eighteenth Amendment Congress has for the first time in one hundred and thirty years submitted the proposal of Amendment *to the States.*

The different course which was pursued in this instance was adopted understandingly and with a purpose. It was necessary to depart from the practice which had always heretofore obtained, in order to carry out the new constitutional doctrine, that the word "amendment" in Article V includes proposals covering the whole field of absolute sovereignty. In the proposal of the so-called Amendment, neither a power nor a subject matter within the scope of the Federal Constitution was dealt with. On the contrary, the power involved resided in the sovereign people of the respective States, and in them exclusively. It was necessary, therefore, in order to obtain a surrender of such power to propose the so-called Amendment to those who possessed it. Recognizing this necessity, Congress made the proposal of the so-called Amendment *to the respective States, that is, to the sovereign people of the respective States. Such a submission of the proposal to the States is nowhere recognized by the Federal Constitution and is a revolutionary proceeding.* The course which has hitherto been pursued in reference to the submission of Amendments to the Legislatures

of the several States is clearly indicated by the joint resolutions adopted by Congress submitting prior Amendments.

(a) Twelve Amendments were submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 25th of September, 1789, at the first session of the First Congress. Ten of these were ratified by the Legislatures, and became the first ten Amendments to the Constitution. The joint resolution of Congress was in the following form:

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following Articles be *proposed to the Legislatures* of the several States, as Amendments to the Constitution of the United States, all or any of which Articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz:" (First Ten Amendments.) Doc. His. of Const., Vol. 2, p. 321.

(b) The Eleventh Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 5th of March, 1794, at the first session of the Third Congress, in the form following:

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following Article be *proposed to the Legislatures* of the several States, as an Amendment to the Constitution of the United States; which when ratified by three-fourths of the said Legislatures shall be valid as part of the said Constitution, viz:" (Eleventh Amendment.) Doc. His. of Const., Vol. 2, p. 391.

(c) The Twelfth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of

Congress, passed on the 12th of December, 1803, at the first session of the Eighth Congress. That the proposal was to the Legislatures is inferred and not expressed.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that in lieu of the third paragraph of the first section of the second article of the Constitution of the United States, the following be proposed as an Amendment to the Constitution of the United States, which when ratified by three-fourths of the Legislatures of the several States, shall be valid to all intents and purposes, as part of the said Constitution, to wit:" (Twelfth Amendment.) Doc. His. of Const., Vol. 2, p. 408.

(d) An amendment relating to Titles of Nobility was submitted *to the Legislatures* of the several States by a joint resolution of Congress, at the second session of the Eleventh Congress, begun and held at Washington on the 27th of November, 1809. This proposed amendment was not ratified. The form of its submission, however, is material.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following section be *submitted to the Legislatures* of the several States, which when ratified by the Legislatures of three-fourths of the States, shall be valid and binding, as a part of the Constitution of the United States, viz:" (Titles of Nobility.) Doc. His. of Const., Vol. 2, p. 452.

(e) An amendment forbidding Congress to interfere with the domestic institutions of the States was submitted *to the Legislatures* of the several States by a joint resolution of Congress at the second session of the Thirty-sixth Congress, begun and held at Washington on the 3rd of

December, 1860. This proposal of amendment was not ratified.

> "*Resolved* by the Senate and House of Representatives of the United States of America, in Congress assembled, that the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:" (Domestic Institutions.) Doc. His. of Const., Vol. 2, p. 516.

(f) The Thirteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress. The resolution read in part as follows:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:" (Thirteenth Amendment.) Doc. His. of Const., Vol. 2, p. 520.

(g) The Fourteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress. The customary form was followed:

> "Be it *Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses con-

curring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely:" (Fourteenth Amendment.) Doc. His. of Const., Vol. 2, p. 638.

(h) The Fifteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, passed on the 27th of February, 1869, at the third session of the Fortieth Congress. Form of the resolution follows:

"*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring), That the following article be *proposed to the Legislatures* of the several States as an Amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures shall be valid as part of the Constitution, namely:" (Fifteenth Amendment.) Doc. His. of Const., Vol. 2, p. 795.

(i) The Sixteenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress, at the first session of the Sixty-first Congress. In this resolution it is inferred and not expressed that the proposal was to the Legislatures of the several States:

"*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein) that the following Article is proposed as an Amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:" (Sixteenth Amendment.)

(j) The Seventeenth Amendment was submitted *to the Legislatures* of the several States by a joint resolution of Congress at the second session of the Sixty-second Congress. Again the submission to the Legislatures is inferred and not expressed:

> "*Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that in lieu of the first paragraph of section three of article one of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, the following be proposed as an Amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of three-fourths of the States." (Seventeenth Amendment.)

(k) The so-called Eighteenth Amendment was submitted *to the States* by a joint resolution of Congress, passed on December 18th, 1917, at the second session of the Sixty-fifth Congress. This is the first proposal of Amendment ever submitted to the States. The material portion of the resolution reads as follows:

> "*Resolved* by the Senate and House of Representaitves of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following Amendment to the Constitution be, and hereby is, *proposed to the States,* to become valid as a part of the Constitution when ratified by the Legislatures of the several States as provided by the Constitution." (So-called Eighteenth Amendment.)

There can be no mistake as to the intent of the proponents of this so-called Amendment to submit it *to the States,* for their avowed purpose is to create a new agreement, a new relationship between the people of the United

States and the people of the respective States. To make that new relationship binding the people of the respective States must be made parties to it, and must be drawn in through the form of submitting the proposal to them. As an inducement to enter this new relationship the people of the respective States are promised "concurrent power." In the third paragraph of the so-called Amendment it is reiterated that the submission is *"to the States by the Congress."* The entire procedure is revolutionary and without constitutional sanction. It surpasses all understanding that Congress while submitting the proposal *to the States* declares that their Legislatures shall bind them. When pray did Congress become the dictator over the sovereign people of a State with respect to their sovereign powers? Sovereignty resides in the people and they alone may express sovereign will.

(12) The Preservation of the States.

Sovereignty is the right to govern. All sovereignty in the last analysis resides in the people, but in our dual system of government sovereignty is divided. A portion of sovereignty resides in the people of the United States and all the residuum is retained by the people of the respective States. The sovereignty of a State is original and is independent of the Federal Constitution. In the exercise of their original sovereignty the people of a State have an inherent right to establish their form of government upon such principles as shall most conduce to their own happiness. This is the basis upon which the whole American fabric has been erected. The principles upon which the people of a State erect their government are deemed to be fundamental and are designed to be permanent. In the Constitution of Rhode Island it is declared in the words of

Washington in his Farewell Address: "The basis of our political system is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." R. I. Const., Art. 1, Sec. 1.

> "The people of the State created, the people of the State only can change, its Constitution." Mr. Justice Iredell, in *Chisholm* v. *Georgia, supra.*
>
> "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it." Mr. Chief Justice Marshall, in *Cohens* v. *Virginia, supra.*

The power of the people of the United States to amend their Constitution is undoubted, and the power of the people of a State to amend their constitution is equally clear. In the case of the so-called Eighteenth Amendment, however, the representatives of the people of the United States have gone beyond their jurisdiction and their powers and have attempted to amend not the Constitution of the United States but the constitution of every State in the Union. If the amending function is construed as coextensive with absolute sovereignty, then the basis of our political system is no longer the right of the people of a State to make and alter their constitution, for their political institutions are at the mercy of others and may be changed against their will. "It would be a novel and dangerous doctrine," said Mr. Madison, "that a Legislature could change the Constitution

under which it held its existence." *Farrand,* Vol. 2, p. 92. If officials may abrogate or fundamentally alter the form of government in State and Nation, to what end is it provided that Senators and Representatives in Congress shall be bound by oath or affirmation to support this Constitution and that each Senator and Representative in a State Legislature shall be equally bound by oath or affirmation to support the constitution of his State?

The preservation of the State governments, by protecting them against encroachment by the Federal Government, may be said to have been the chief concern of all the patriots who had any part either in the framing or the adoption of the Constitution. Their declarations of this purpose are without number and quotations may seem unnecessary. These few, however, will illustrate the spirit of all.

> Mr. Iredell, (N. C.): "I heartily agree with the gentleman, that, *if anything in this Constitution tended to annihilation of the state government, instead of exciting the admiration of any man, it ought to excite the resentment and execration. No such wicked intention ought to be suffered. But the gentlemen who formed the Constitution had no such object;* nor do I think there is the least ground for that jealousy. The very existence of the general government depends on that of the state governments." El. Deb., Vol. 4, p. 53.

Mr. Hamilton, (N. Y.): "The state governments are essentially necessary to the form and spirit of the general system. As long, therefore, as Congress have a full conviction of this necessity, they must, even upon principles purely national, have as firm an attachment to the one as to the other. This conviction can never leave them, unless they become madmen. *While the Constitution continues to be read, and its principles known, the states must, by every rational man, be considered as essential, component parts of the Union; and therefore the idea of sacrificing the former to the latter*

is wholly inadmissible. * * * The gentlemen are afraid that the state governments will be abolished. But, sir, their existence does not depend upon the laws of the United States. *Congress can no more abolish the state governments, than they can dissolve the Union. The whole Constitution is repugnant to it."* El. Deb., Vol. 2, pp. 304, 309.

Mr. Davie, (N. C.): "Mr. Chairman, a consolidation of the states is said by some gentlemen to have been intended. * * * *If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection,* I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government. The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government." El. Deb., Vol. 4, p. 58.

We assert that Congress in proposing and the Legislatures of the several States in ratifying the so-called Amendment have gone beyond their jurisdiction and their powers. The limitations of territorial jurisdiction are readily recognized; but the limitations of jurisdiction which are measured by delegated powers are not so easily discernible. "Were any one State of the Union to pass a law for trying a criminal in a Court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation." *Cohens* v. *Virginia, supra.* The Federal Government has no territorial jurisdiction within the boundaries of the State of Rhode Island, nor within the boundaries of any State of the Union. The operation of its powers within the limits of States is confined strictly to the powers delegated.

Beyond the powers delegated it is powerless and can assume no jurisdiction. In *Ableman* v. *Booth, supra,* the Supreme Court of the State of Wisconsin upon habeas corpus proceedings released the defendant, who was in the custody of a United States marshal under process from the Federal court. Mr. Chief Justice Taney observed with reference to jurisdiction:

> "This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. *But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further.* They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under the State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States."

So in the present case upon the first presentation of the proposal of the so-called Amendment Congress should have recognized that both the power involved and the subject matter dealt with in the Amendment was wholly within the dominion and jurisdiction of the States, and that they were powerless to pass over the line of division which separates the Federal from State jurisdiction. The proposal was void *ab initio.*

The power of police is an attribute of State sovereignty. It resides in the States exclusively and is necessary to their

existence as organized governments. There is no divided authority, either in respect to its possession or in respect to its exercise. The Federal Government has no police power. Each State is supreme in the possession and in the exercise of the power within its territorial limits. "That there is a plain repugnance in conferring upon one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which asserts the control, is a proposition not to be denied." *McCulloch* v. *Maryland, supra.* Even where the Federal Government and a State government possess a similar power, as in the case of the power to tax, a necessary implication will be raised to prevent either the Federal Government or a State government from impairing the existence and efficiency of the other. In *McCulloch* v. *Maryland, supra,* such an implication was raised to protect the Federal Government; and in *Collector* v. *Day, supra,* such an implication was raised to protect a State. In the latter case, Mr. Justice Nelson based his opinion upon the great law of self-preservation.

> *"In this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government.* And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In*

both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

In *McCulloch* v. *Maryland, supra,* Mr. Chief Justice Marshall said that if we measure a power residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. Then said he:

> "We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve."

If a power admittedly delegated to the Federal Government under the Constitution may be restrained by necessary implication because it tends to impair or destroy the existence of a State, and this implication arises by virtue of the great law of self-preservation how much more reason is there in construing the Constitution to exclude a principle of perpetual conflict that directly tends to the destruction of the States? If the police power residing in a State is to be measured by the extent of sovereignty which the people of a State possess with reference to it, then the measure of that power is full and complete. That a State is exclusively sovereign with respect to a power and at the same time may be deprived of that power against its will is utterly repugnant to all conceptions of sovereignty and to the spirit

of the Constitution. "That is a very narrow view of the Constitution," said Mr. Justice Wayne in the *Passenger Cases, supra,* "which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve or even disquiet the fundamental organization of either of the States."

In *Hammer* v. *Dagenhart,* 247 U. S. 251 (1917), Mr. Justice Day, speaking for the Court, observed:

> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters intrusted to the Nation by the Federal Constitution. * * * This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

In *Texas* v. *White,* 7 Wall. 700, 725 (1868), Mr. Chief Justice Chase wrote that memorable passage that should be our guidance for all time:

> *"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States.* Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively or to the people. And we have already had occasion to remark at this term, that

> 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *Lane Co.* v. *Oregon*. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*"

And Mr. Justice Brewer, in *Keller* v. *United States,* 213 U. S. 138 (1908), thus emphasized the statement of Mr. Chief Justice Chase:

> *"We should never forget the declaration in Texas* v. *White,* 7 Wall. 100, 725, *that 'the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible states.'"*

The State of Rhode Island respectfully submits that the motion to dismiss its bill should be denied and that its prayer for relief should be granted.

HERBERT A. RICE
Attorney General

A. A. CAPOTOSTO
Assistant Att'y Gen'l

UNIVERSITY OF ILLINOIS-URBANA
3 0112 041655272